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No. OFFICE OF THE CLERK

In the

Supreme Court of the United States

BUILDING INDUSTRY ASSOCIATION OF SUPERIOR CALIFORNIA, ET AL.,

Petitioners,

v.

GALE NORTON, ET AL.,

Respondents,

ENVIRONMENTAL DEFENSE CENTER, ET AL.,

Respondent-Intervenors.

On Petition for Writ of Certiorari to United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

LAWRENCE R. LIEBESMAN
RAFE PETERSEN
Holland & Knight LLP
2099 Pennsylvania Avenue
N.W., Suite 100
Washington, DC 20006-6801
Telephone: (202) 955-3000
Facsimile: (202) 955-5564

M. REED HOPPER
Counsel of Record
ROBIN L. RIVETT
Pacific Legal Foundation
10360 Old Placerville Road, Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Petitioners

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QUESTIONS PRESENTED

1. Does the federal power to regulate commerce among the several states extend to regulation under the Endangered Species Act of species or activities that are *entirely intrastate* and *noneconomic in nature*?

2. Is an agency justified, under the Administrative Procedure Act and the Endangered Species Act, in refusing to make available for notice and comment a scientific study on which it indisputably placed "great weight" and which it touted as the "best scientific and commercial data available" merely because that study became available after the notice of proposed rulemaking?

PARTIES TO THE PROCEEDINGS

Petitioners are the Building Industry Association of Superior California, Marvin L. Oates, and the Sacramento Metropolitan Chamber of Commerce. The Rescue Union School District was a plaintiff below but is not a party to this petition. Respondents are Gale A. Norton, Secretary of the United States Department of Interior; the United States Department of Interior; Marshall P. Jones, Jr., Acting Director, United States Fish and Wildlife Service; and the United States Fish and Wildlife Service. Respondent-Intervenors are the Environmental Defense Center and the Butte Environmental Council.

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PETITION FOR WRIT OF CERTIORARI

The Building Industry Association of Superior California, Marvin L. Oates, and the Sacramento Metropolitan Chamber of Commerce respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 247 F.3d 1241 (D.C. Cir. 2001), and is included in Appendix (App.) B. The opinion of the District Court is reported at 979 F. Supp. 893 (D.D.C. 1997), and is also included in Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on May 8, 2001. That Court's summary denial of the Petition for Hearing En Banc was entered on July 13, 2001, included in Appendix A. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The pertinent provision of the United States Constitution provides that Congress has power "to regulate commerce . . . among the several states." Art. I, § 8, cl. 3.

The pertinent provisions of the Endangered Species Act are found at 16 U.S.C. § 1533 and are set out in Appendix E. The pertinent provisions of the Administrative Procedure Act are found at 5 U.S.C. § 706(2)(A),(D) and 5 U.S.C. § 553(b)-(c) and are set out in Appendix D.

STATEMENT OF THE CASE

Landowners throughout the California Central Valley, like Petitioner Marvin Oates, run the risk of violating federal law by simply walking on their land. Placing a foot in a puddle of water can result in heavy fines or even imprisonment if it harms the small and delicate fairy shrimp. Fairy shrimp are tiny, fly-sized freshwater crustaceans that are found only in California's Central Valley Region. 59 Fed. Reg. 48,136 (September 19, 1994). These wholly intrastate and noncommercial species inhabit small seasonal wetlands, tire ruts, roadside ditches, and backhoe pits. *Id.* at 48,145. The species of fairy shrimp at issue in this case are listed and regulated by the federal government as endangered or threatened under the Endangered Species Act (ESA) which was promulgated under Congress' Commerce Clause power. The Act imposes civil, and even criminal, sanctions on anyone who "takes," or harms, these species—by any means—without a federal permit. *See* 16 U.S.C. §§ 1538(a)(1) and 1540(a) and (b).

Petitioners are, or represent, landowners on whose property the fairy shrimp can be found. These landowners have been frustrated in the use of their land because any disturbance of fairy shrimp habitat—whether wet or dry—may kill or hurt the protected species. *See id.* 59 Fed. Reg. at 48,147-48,149. Without federal authorization, under the ESA, these landowners may not rake, hoe, disc, drain, fill or otherwise modify (or even enter) certain portions of their property, like the small and widely dispersed vernal pools in which fairy shrimp commonly thrive. *See id.* and 16 U.S.C. § 1538(a)(1) and (a)(1)(B). Vernal pools are seasonally wet, isolated water bodies that pond during the winter and spring, and evaporate during the summer. But even during the dry season, these habitat areas contain dormant fairy shrimp eggs that may not be disturbed. As a result of these limitations, Petitioners challenged the authority

of the federal government to regulate these species of fairy shrimp under the Commerce Clause, whereby federal officials effectively control local land use, arguing that the listing of these intrastate, noncommercial species is beyond the regulatory reach of Congress.

When the United States Fish and Wildlife Service listed the fairy shrimp as endangered or threatened, the Service did not establish any connection whatsoever between the fairy shrimp and interstate commerce as required by this Court's recent Commerce Clause decisions. But the district court and court of appeals sustained the listing of these four species of fairy shrimp under the ESA as a legitimate Commerce Clause regulation. Because this Court has struck down similar provisions and "upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature," *see United States v. Morrison*, 529 U.S. 598, 613 (2000), Petitioners seek relief in this Court to correct the constitutional conflicts below.

Petitioners also seek relief in this Court to resolve a conflict between the D.C. and Ninth Circuits on a procedural question of national importance. When the Service proposed listing five species of fairy shrimp as endangered or threatened, the Service had very little population data on which to base its listing determination. *See* 59 Fed. Reg. at 48,142. Many of those who commented, including Petitioners, objected to the listing because the Service lacked sufficient information to conclude the species were endangered or threatened. 59 Fed. Reg. at 48,139-48,147. In fact, one species was dropped from the listing and another was downgraded from endangered to threatened when subsequent data, submitted in part by Petitioners, showed the species were more widely distributed than the Service had thought. *Id.* at 48,136 and 48,151.

Nevertheless, during the comment period, the Service obtained a limited study—known as the "Simovich Study"—of

fairy shrimp distribution that filled some (but not all) of the data gaps left open in the proposed rule. App. B-6-7. Although this new study was the most comprehensive study on fairy shrimp population ever conducted and the Service touted it as "the best scientific and commercial data available," upon which it substantially relied for its final listing determination, the Service did not circulate the study for review and comment by interested parties. App. B-6-10.

Petitioners challenged the adequacy of the study to support the final listing determination and the district court agreed with Petitioners that the study should have been circulated for public comment but concluded the failure to circulate did not justify invalidation of the rule. App. C-15-19. The court of appeals also upheld the final listing determination holding that the new study "did no more than provide support for the same decision [the agency] had proposed to take." App. B-8. In other words, if the agency already has its mind made up at the proposal stage, before it has reviewed all the data, no amount of new data need be circulated for public notice and comment even if the agency substantially relies on that data. Petitioners argue, among other things, that this standard encourages uninformed decision making and directly conflicts with *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392 (9th Cir. 1995), wherein the Ninth Circuit held, on nearly identical facts, that such a study is subject to statutory notice and comment requirements under the Endangered Species Act and the Administrative Procedure Act.

A. Factual Background

The Endangered Species Act directs the Secretary of Interior, through the United States Fish and Wildlife Service, to determine whether any species is endangered or threatened. *See* 16 U.S.C. § 1533(a), App. E-1. That determination must be made solely on the "best scientific and commercial data available" after taking into consideration (1) the status of the species' habitat and range, (2) overutilization, (3) disease or predation, (4) the inadequacy of existing regulations, and (5)

other factors affecting its continued existence. 16 U.S.C. § 1533(a)(1), App. E-1, and (b)(1)(A), App. E-3. Any "interested person" may petition the Service to list a species as endangered or threatened. 16 U.S.C. § 1533(b)(3)(A), App. E-4.

In 1990 and 1991, the Service received petitions to list various fairy shrimp species as endangered. In 1992, the Service proposed the listing of five species of fairy shrimp as endangered or threatened. *See* 57 Fed. Reg. 19,856-19,862 (May 8, 1992). Fairy shrimp are small aquatic invertebrates with elongated bodies and stalked compound eyes, no carapace and 11 pairs of swimming legs. *Id.* at 19,856. These fingertip-sized species are known to survive in freshwater habitats, predominantly in vernal pools and swales. *Id.* Vernal pools are shallow depressions that fill with water during the fall and winter seasons, then evaporate in the spring. The distribution of vernal pools is reported to be highly discontinuous and some aquatic invertebrates, like the fairy shrimp, that are found in these pools occur only in specific geographic areas. *Id.* at 19,857. Fairy shrimp lay eggs that lie dormant through the dry months and hatch when the habitat is filled with rainwater during the fall and winter. *Id.* at 19,856-19,857. The listed species in this case are wholly intrastate, limited to California. 59 Fed. Reg. at 48,147. They have no commercial purpose. *Id.* at 48,149.

The proposal to list the fairy shrimp was controversial from the start, and many people, including Petitioners, submitted comments that questioned or contradicted the data on which the Service relied. *See* 59 Fed. Reg. at 48,138-48,147. After the close of the comment period, the Service extended the date for public comment by six months to collect additional data. 57 Fed. Reg. 36,380. The ESA allows such an extension when "there is substantial disagreement regarding the sufficiency or accuracy of the available data" relevant to the listing determination. 16 U.S.C. § 1533(b)(6)(B)(i), App. E-7. In 1994, the Service published its final rule listing the Conservancy fairy shrimp, the longhorn fairy shrimp, and the vernal pool tadpole shrimp as endangered species, and the vernal pool fairy shrimp as a

threatened species. *See* 59 Fed. Reg. 48,136-48,153. The final rule did not list the California linderiella, as had been proposed, because scientific data submitted by Petitioners' (BIA) consultants showed that the species was more abundant than the Service believed. *Id.* at 48,136. For like reason, the status of the vernal pool fairy shrimp was changed from endangered to threatened.

In response to comments that the Service lacked comprehensive vernal pool sampling data, the Service referenced—for the first time in the final rule—a 1991-1993 field survey known as the "Simovich Study." *See id.* at 48,141. The Service cited this study extensively to support its listing determination but never circulated the study for public review and comment. App. B-6-7. Petitioners challenge the adequacy of that study.

Once listed as endangered or threatened a species is automatically afforded various protections under the ESA. Some of these protections impose duties on federal agencies while others restrict private conduct. Section 7 of the Act requires that federal agencies "insure that any action authorized, funded, or carried out by such agency" will not jeopardize the continued existence of the protected species or adversely modify its critical habitat. 16 U.S.C. § 1536(a)(2). Under this section, the agency may deny a permit or license to an applicant if the proposed activity would jeopardize the protected species or adversely modify critical habitat, unless, after consultation with the United States Fish and Wildlife Service (or in some cases the National Marine Fisheries Service), the activity can be modified with "reasonable and prudent" alternatives or measures that are protective of the species. 16 U.S.C. § 1536(b). Under section 9 of the Act, no person may "take" a listed species without a federal permit. 16 U.S.C. § 1538(a)(1). "Take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). These limitations, as well as other provisions of the Act, apply to nonfederal actors such as Petitioners without regard to whether

the regulated species or activity has a connection with or effect on interstate commerce. Section 11 provides both civil and criminal penalties for violations of the Act. *See* 16 U.S.C. § 1540.

B. Judicial Proceedings

Petitioners filed this suit challenging the listing of the fairy shrimp on various grounds, including: (1) as applied to the fairy shrimp, the listing went beyond the Commerce Clause power of Congress, and (2) the Service did not comply with the procedural requirements of the ESA and the APA to provide notice and opportunity for comment on a study characterized as the "best scientific . . . data available" and on which the Service indisputably placed "great weight" in its final listing decision.

1. The Commerce Clause Challenge

The district court upheld the listing against the Commerce Clause challenge distinguishing *United States v. Lopez*, 514 U.S. 549 (1995), wherein this Court invalidated the Gun-Free School Zones Act because it had "nothing to do with 'commerce.'" App. C-27. Relying heavily on pre-*Lopez* decisions, the District Court held that wildlife may have a substantial effect on interstate commerce and that Congress had power to regulate wildlife even if the protected species was not interstate in character. App. C-27-31.

On appeal the Court of Appeals for the District of Columbia Circuit did not address the merits of Petitioners' Commerce Clause claim. Rather, bound by the "law of the circuit," the court simply noted that the Commerce Clause claim fails under *National Association of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998), a split-panel decision of the appellate court, and was asserted "to preserve the possibility of en banc review." App. B-10.

Petitioners timely filed a Petition for Hearing En Banc asking the full court to reconsider their Commerce Clause claim

in light of this Court's recent decision in *Morrison*. In that case, this Court struck down 42 U.S.C. § 13981, which provided a federal civil remedy for victims of gender-motivated violence, because: (1) gender-motivated crimes are not economic activity; (2) the statute contained no jurisdictional element establishing a connection between the regulated activity and interstate commerce; and, (3) the government cannot aggregate attenuated effects on interstate commerce to establish a commerce connection. Petitioners argued that the listing challenge in this case was controlled by *Morrison* and that *National Association of Home Builders* is wholly inconsistent with that decision and should be overruled. But the Petition for Hearing En Banc was denied on July 13, 2001.

2. The Procedural Challenge and Circuit Conflict

The district court determined that because the final rule relied heavily on the "Simovich Study" for "the important proposition that fairy shrimp are rare within their ranges . . . the study should have been made available for notice and comment." App. C-17. But, the district court found that this failure did not justify overturning the rule. App. C-17-19.

On appeal, the circuit court noted the significance of the "Simovich Study:" (1) citing it as the most comprehensive study of vernal pools ever attempted in California; (2) acknowledging that the Service indisputably "placed great weight" on the study; and (3) characterizing the study as "the best scientific . . . data available." App. B-6-9. But the Panel concluded comment by interested parties was not necessary because the study "did no more than provide support for the same decision [the Agency] had proposed to take." App. B-8.

In the subsequent Petition for Hearing En Banc, Petitioners argued that the rule adopted by the Panel for notice and comment directly conflicts with the Ninth Circuit decision in *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392. In that case, the court of appeals held that a study cited in support of the listing of

an endangered species, obtained only after notice of the proposed rule, as in this case, must be circulated for review by interested parties because: (1) the study filled data gaps, (2) the study provided unique information, and (3) the agency relied heavily on the study to support its final rule. Petitioners also argued that the panel decision encourages uninformed decision making, permits preconceived determinations, undermines the goals of public notice and comment, and violates the ESA and the APA. But, as noted above, the Petition for Hearing En Banc was denied on July 13, 2001.

REASONS FOR GRANTING THE WRIT

This case raises a constitutional challenge to the Endangered Species Act which this Court has described as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation," *TVA v. Hill*, 437 U.S. 153, 180 (1978). Indeed, the ESA is pervasive and requires the protection of a listed species, like the fairy shrimp, "whatever the cost." *Id.* at 184. These fairy shrimp are found throughout the California Central Valley in habitats such as vernal pools and swales and have been noted in roadside ditches, backhoe pits, and even tire ruts.

These habitat areas are essentially off limits to any person and cover thousands of acres, including prime farm land. Traditional uses of the land, such as smoothing the ruts in a road, plowing a field for planting, or building a new school can result in a "take" of the species, which, if unauthorized, may result in heavy civil fines ($25,000 per violation) or severe criminal penalties, including imprisonment. *See* 16 U.S.C. § 1540(a) and (b). The innocent act of a child riding a bike through a small vernal pool could also harm the fairy shrimp and subject the person to civil or criminal penalties.

It behooves this Court, therefore, to determine the reach of the Commerce Clause in species' protection. Under the lower court decision, there are no limits to the power of Congress to regulate intrastate, noncommercial objects or activities, like the fairy shrimp in this case. But the question presented here is not limited to the fairy shrimp. Approximately half of all species listed as endangered or threatened in the United States are found in only one state. This question is sure to be repeated.

This Court should also review this case to address an important procedural question of notice and comment and to resolve a conflict between the D.C. Circuit and the Ninth Circuit that goes to the heart of the ESA listing process.

I

WHETHER THE FEDERAL POWER TO REGULATE COMMERCE AMONG THE SEVERAL STATES EXTENDS TO REGULATION UNDER THE ENDANGERED SPECIES ACT OF SPECIES OR ACTIVITIES THAT ARE *ENTIRELY INTRASTATE* AND *NONECONOMIC IN NATURE* IS AN IMPORTANT QUESTION THAT THE LOWER COURT DECIDED CONTRARY TO THE DECISIONS OF THIS COURT

This Court has never upheld a Commerce Clause regulation of an intrastate activity that is not economic in nature. *United States v. Morrison*, 529 U.S. at 598, 586, 611. To the contrary, this Court has consistently struck down such regulation, including a prohibition on the possession of a gun within 1,000 feet of a school (*United States v. Lopez*) and a statute authorizing civil damages for gender-motivated crimes (*United States v. Morrison*). The basis for this Court's recent rulings is clear: the Commerce Clause power has limits. It is therefore essential that this Court determine the scope of that power in the context of the Endangered Species Act. That Act, more than any other, challenges the outer limits of Congress' Commerce Clause authority. As applied in this case, the ESA admits of no limits

to the federal regulatory power, intrudes on state sovereignty, and usurps local land use control.

A. *National Association of Home Builders v. Babbitt*, to Which the Lower Court Deferred, Is in Error and Conflicts with the Decisions of This Court

Notwithstanding this Court's recent decision in *United States v. Morrison*, the lower court did not address Petitioners' Commerce Clause challenge on the merits, but deferred to its own insupportable decision in *National Association of Home Builders*, 130 F.3d at 1041. In that case, the Court of Appeals for the District of Columbia Circuit had to determine if section 9 (16 U.S.C. § 1538(a)(1)(B)) of the Endangered Species Act, which makes it unlawful for any person to "take" any endangered or threatened species, exceeded Congress' Commerce Clause power as applied to the Delhi Sands Flower-loving Fly. At the time, there were eleven known populations of the fly, all within an eight-mile radius in San Bernardino and Riverside Counties in California. The dispute arose when the United States Fish and Wildlife Service listed the fly as an endangered species and halted construction of a sorely-needed hospital located in fly habitat in San Bernardino County.

The County and others sued the Service arguing, among other things, that the federal government did not have authority to regulate the "taking" of the fly—a wholly intrastate and noneconomic activity—or interfere in traditional areas of local concern. Plaintiffs relied on *United States v. Lopez*, 514 U.S. 549, wherein this Court struck down the Gun-Free Schools Zone Act as an invalid Commerce Clause enactment. The Act prohibited possession of a gun within 1,000 feet of a school. Although guns are bought and sold and move across state lines, this Court held that the Act "has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Id.* at 561. Additionally, this Court found the Act did not contain a jurisdictional element that "would ensure, through case-by-case inquiry, that the firearm

possession in question affects interstate commerce" or that would limit the Act's reach "to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." *Id.* at 562.

This Court flatly rejected the government's argument that the cost of gun-related crime in the aggregate had a substantial impact on the economy and adversely affected education. "[I]f we were to accept the Government's arguments," this Court stated, "we are hard pressed to posit any activity by an individual that Congress is without power to regulate." *Id.* at 564. This Court was simply unwilling to transform Congress' Commerce Clause authority into a general police power like that retained by the States. *Id.* at 567.

But the appellate court in *Home Builders* was not so constrained. Although that case would appear to be a precise fit with *Lopez*, the majority upheld the "take" provision of the ESA as applied to the Delhi Sands Flower-loving Fly. The majority judges in *Home Builders* could not agree on the basis for upholding the "take" provision but held variously that the protection of even noncommercial, intrastate species can be aggregated to show a connection to interstate commerce or that the ESA really regulates habitat, not just species, and that the development of such habitat is obviously connected with interstate commerce. *See Home Builders*, 130 F.3d at 1049-57, 1057-60. One judge even suggested, inexplicably, that the "take" prohibition amounted to regulation of channels of interstate commerce and so could be regulated under the Commerce Clause. *Id.* at 1046-49.

But that decision was patently inconsistent with this Court's rationale in *Lopez*. Like the possession of guns in *Lopez*, the "taking" of the fly in *Home Builders* had nothing to do with "commerce" or any other economic activity. Indeed, the "taking" of the fly, which was not bought and sold on the

open market, had less of a connection to "commerce" than the possession of a gun, an indisputable commercial item.

Additionally, the ESA did not contain a jurisdictional element that would ensure through case-by-case inquiry that the fly, or the "taking" of the fly, would have an explicit connection to or effect on interstate commerce, a lapse fatal to the Gun-Free Schools Zone Act. Nevertheless, the court in *Home Builders* limited *Lopez* to its facts and decided the "taking" provision of the Endangered Species Act, as applied to the fly, was a proper exercise of Congress' Commerce Clause power.

If *Lopez* were not clear enough, however, this Court was even more explicit in a recent decision holding that, in cases like *Lopez*, the Commerce Clause is restricted to activity that is economic in nature and substantially affects interstate commerce. Last year, this Court decided *United States v. Morrison*, 529 U.S. 598, which involved a Commerce Clause challenge to 42 U.S.C. § 13981. That statute provided a federal civil remedy for the victims of gender-motivated crimes. Building on *Lopez*, this Court ruled that the statute could not be sustained under the Commerce Clause.

In *Morrison*, this Court affirmed that every law enacted by Congress must be based on a power enumerated in the Constitution. *Morrison*, 529 U.S. at 607. Although Congress has been given wide latitude under the Commerce Clause, this Court said the modern court has recognized limits to that power. *Id.* at 608. Since 42 U.S.C. § 13981 was focused on "gender-motivated violence wherever it occurs (rather than violence directed at the instrumentalities of interstate commerce, interstate markets, or things or persons in interstate commerce)," this Court determined the proper inquiry was whether gender-motivated crime substantially affected interstate commerce. *Morrison*, 529 U.S. at 609.

This Court adopted *Lopez* as the proper framework for that inquiry and observed that central to the *Lopez* decision was the

noneconomic nature of the statute. *Id.* at 610. And to emphasize the point, this Court stated:

> *Lopez's* review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor.

Id. at 611.

This Court also observed that in *Lopez* there was no jurisdictional element establishing a case-by-case connection to interstate commerce and that the *Lopez* decision rested in part on the fact that the "link between gun possession and a substantial effect on interstate commerce was attenuated." *Id.* at 612.

With these principles underlying this Court's jurisprudence, this Court found resolution of the gender-motivated crime statute clear: "[T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Id.* at 613. This Court, therefore, challenged the government's arguments that all gender-motivated crime, a noneconomic endeavor, may be combined to show a substantial effect on interstate commerce. These arguments, this Court stated, are

> substantially weakened by the fact that they rely so heavily on a method of reasoning that we have already rejected [in *Lopez*] as unworkable if we are to maintain the Constitution's enumeration of powers."

Id. at 615.

Thus, this Court held:

> We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local.

Id. at 617-18.

For the same reasons, resolution of *Home Builders* should have been equally clear. The "take" provision of the Endangered Species Act prohibits all harmful conduct, however it may occur, and is not directed at the instrumentalities of interstate commerce, interstate markets, or things or persons in interstate commerce, so the proper inquiry was whether the "taking" of the fly substantially affected interstate commerce. Since the "taking" of the Delhi Sands Flower-loving Fly was no more interstate and economic in nature than the possession of a gun in *Lopez* and a gender-motivated crime in *Morrison*, the "take" provision should have been recognized as an invalid Commerce Clause regulation.

Likewise, under the *Lopez* framework, the listing of four species of fairy shrimp as endangered or threatened utterly fails as a valid exercise of the Commerce Clause power. Under *Lopez*, this Court asks: (1) if the regulated object or activity is economic in nature; (2) if the statute has a jurisdictional element establishing through case-by-case analysis a connection to interstate commerce; and (3) if the regulation intrudes on areas of traditional state concern.

First, the fairy shrimp are a very small, isolated species that have no known commercial use. *See* 59 Fed. Reg. at 48,147. The listing of such a species under the ESA–which automatically invokes the protections of the Act, including the "take" provision at issue in *Home Builders, see* 16 U.S.C. § 1538(a)(1)(B)—has by its own terms nothing to do with commerce or any sort of economic activity.

Second, the Endangered Species Act has no jurisdictional element establishing through case-by-case analysis a connection to interstate commerce. To the contrary, the statutory mandate to list a species as endangered or threatened applies across the board to all plants and animals wherever they may be found—intrastate or interstate—and without regard to the species' connection to commerce of any kind.

Indeed, the ESA requires that a listing determination rest solely on the biological status of the species and prohibits a consideration of the economic impacts of the listing:

> Because the Service is specifically precluded from considering economic impacts in a final decision on proposed listing, the Service has not considered possible economic consequences of listing the three fairy shrimp and the vernal pool tadpole shrimp.

59 Fed. Reg. at 48,139.

Also, when the Service considered whether these species were affected by "overutilization for commercial, recreational, scientific, or educational purposes," the Service concluded, succinctly, that this factor was: "Not known to be applicable." *Id.* at 49,149.

And, third, the listing of the fairy shrimp substantially intrudes on the sovereign power of the State to control local land use—an area of traditional state concern. *See FERC v. Mississippi*, 456 U.S. 742, 768 n.30 (1982) ("Regulation of land use is perhaps the quintessential state activity.").

Aside from these three factors, this Court weighs a final factor; that is, whether the basis for the regulation has any logical stopping point. A Commerce Clause enactment that relies on combining attenuated economic impacts and unduly expands the reach of Congress will not be sustained. *See Morrison*, 529 U.S. at 617-18. The listing of the fairy shrimp is a case in point.

The fairy shrimp have no relation to interstate economic activity and even less of a connection to commerce than the gun in *Lopez* or the gender-motivated crime in *Morrison*. As noted above, these four species are limited to the California Central Valley and are not a commercial species. If Congress can regulate under the Commerce Clause wholly intrastate objects or activity that have nothing to do with commerce or any other economic enterprise, like the local fairy shrimp in this case, there is nothing that Congress is without power to regulate. Congress would be free to regulate "any action that might conceivably affect the number or continued existence of any item whatsoever." *Home Builders*, 130 F.3d at 1065 (Sentelle, J., dissenting).

A creative court can always find an ultimate "connection," no matter how attenuated, to some economic endeavor so as to putatively bring the object or activity under the Commerce Clause. For example, in *Home Builders*, Judge Henderson argued that the "take" provision of the ESA was directed not so much at the Delhi Sands Flower-loving Fly, but at its habitat. Therefore, she concluded, the development of such habitat would supply the necessary commerce link. By this reckoning, however, there is no stopping point to Congress' Commerce Clause power.

This tendency of the lower courts, like the D.C. Circuit in *Home Builders*, to stretch the Commerce Clause to the breaking point–because the listing and "take" provisions of the ESA do not satisfy the substantially affects test of *Lopez* and *Morrison*–warrants review by this Court.

Whether Congress can list an intrastate, noncommercial species, like the fairy shrimp in this case, as endangered or threatened under the ESA is an important question in need of resolution by this Court. Not only does the lower court decision conflict with Supreme Court precedent and blur the distinction between what is national and what is local, but the question will

surely be repeated. As Judge Wald observed in *Home Builders*: "Approximately 521 of the 1082 species in the United States currently designated as threatened or endangered are found in only one state." 130 F.3d at 1052.

To be sure, the answer to the listing question pits bedrock constitutional principles against the natural and laudable desire of Congress to protect the environment. But, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut" than the Constitution allows. *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393, 416 (1922).

B. The Lack of a Clear Rationale in *National Association of Home Builders v. Babbitt*, to Resolve the Commerce Clause Question, Warrants a Writ of Certiorari in This Case

Not only does the split decision in *Home Builders* conflict with the decisions of this Court, but that case fails to provide any cogent rationale for upholding the ESA under the Commerce Clause. The majority judges simply could not agree on the basis for sustaining the "take" provision of the ESA as applied to the Delhi Sands Flower-loving Fly. In fact, they each expressly rejected the other's arguments. Therefore, the decision provides a dubious precedent for other courts.

In *Home Builders*, Judge Wald took the unique position that section 9, the "take" provision of the Endangered Species Act, was a proper exercise of Congress' Commerce Clause power over the "use of the channels of interstate commerce" because section 9 enables the government to control the transport of endangered species, and it keeps the channels of interstate commerce free from immoral and injurious uses. *Home Builders*, 130 F.3d at 1046. In direct conflict with *Lopez*, Judge Wald also upheld section 9 as a regulation of activity that substantially affects interstate commerce: "A class of activities can substantially affect interstate commerce regardless of

whether the activity at issue—in this case the taking of endangered species—is commercial or noncommercial." *Id.* at 1049.

Although Judge Henderson agreed with Judge Wald that section 9 was a proper exercise of Congress' Commerce Clause power, she expressly disagreed with Judge Wald's grounds for the decision; she openly rejected the "use of channels" argument:

> The Delhi Sands Flower-loving Flies the Department of the Interior seeks to protect are (along with many other species no doubt) entirely *intra*state creatures. They do not move among states either on their own or through human agency. As a result, like the Gun-Free School Zones Act in *Lopez*, the statutory protection of the flies "is not a regulation of the use of the channels of interstate commerce."

Id. at 1058 (emphasis in original).

Judge Henderson also rejected Judge Wald's speculative argument that the potential loss of medical or economic benefit from a protected species would have a substantial effect on interstate commerce: "I do not see how we can say that the protection of an endangered species has an effect on interstate commerce (much less a substantial one) by virtue of an uncertain potential medical or economic value." *Id.* at 1058.

Instead, Judge Henderson went in a different direction. She opined that the loss of biodiversity itself has a substantial effect on our ecosystem and, therefore, on interstate commerce. Finally, Judge Henderson changed the focus of the inquiry from the challenged regulation—section 9, which prohibits the "taking" of a threatened or endangered species—to the underlying land use. She ignored the Supreme Court's concerns expressed in *Lopez* that Congress may not use the Commerce

Clause to regulate areas of purely local concern and argued that the government is really regulating habitat. Thus, Judge Henderson concluded, the proposed development in this case (the intersection and hospital) "has an obvious connection with interstate commerce." *Id.* at 1059.

This disagreement between Judge Wald and Judge Henderson leaves the decision in *Home Builders* without a clear constitutional standard. No other court can point to this decision and cite a consistent rationale for evaluating Commerce Clause regulation under the Endangered Species Act. Yet other panels are considering the issue closed. This is significant because the D.C. Circuit is the primary venue for challenging ESA rules. This uncertainty is exacerbated by the fact that it was the dissent in *Home Builders* that was true to this Court's precedent.

Judge Sentelle applied the *Lopez* framework to section 9 and concluded in his dissent that the "take" prohibition could not constitutionally stand as applied to the Delhi Sands Flower-loving Fly. He observed that the "take" regulation does not control a commercial activity: "Neither killing flies nor controlling weeds nor digging holes is either inherently or fundamentally commercial in any sense." *Id.* at 1064. Like the statute struck down in *Lopez*, Judge Sentelle argued, the "take" provision "by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Id.*

Judge Sentelle further argued that nothing in the "take" provision of the ESA or any other governing section requires that a regulated activity affect interstate commerce or provides a jurisdictional nexus as *Lopez* requires. *Id.* He concludes that the decision to uphold section 9 in this context would allow Congress to regulate under the Commerce Clause without any "logical stopping point." *Id.* at 1065.

A grant of review by this Court is, therefore, necessary to review the dubious precedent of the D.C. Circuit and to determine the reach of the Commerce Clause in species protection.

II

WHETHER AN AGENCY IS JUSTIFIED, UNDER THE APA AND ESA, IN REFUSING TO MAKE AVAILABLE FOR NOTICE AND COMMENT A SCIENTIFIC STUDY ON WHICH IT INDISPUTABLY PLACED "GREAT WEIGHT" AND WHICH IT TOUTED AS THE "BEST SCIENTIFIC AND COMMERCIAL DATA AVAILABLE" MERELY BECAUSE THAT STUDY BECAME AVAILABLE AFTER THE NOTICE OF PROPOSED RULE MAKING IS AN IMPORTANT QUESTION THAT INVOLVES A DIRECT CONFLICT BETWEEN TWO CIRCUITS

The listing of the fairy shrimp violated the procedural requirements of the ESA and the APA because a study of fairy shrimp populations on which the agency placed "great weight" and touted as the "best scientific and commercial data available" was not made available for review and comment by interested parties before the final listing determination. The lower court ruling to uphold the final listing determination, despite the failure to circulate the study, and in the face of Petitioners' claims that the study was inadequate to support the final listing determination, was both incorrect and in conflict with a decision of the Ninth Circuit.

When the United States Fish and Wildlife Service proposed listing five species of fairy shrimp, comments were submitted by Petitioners and others that questioned or contradicted the data on which the Service relied. As a result, the Service extended the date for a final decision to collect additional data in light of the "substantial disagreement regarding the sufficiency [and] accuracy of the available data

relevant" to listing the species. *See* 57 Fed. Reg. 19,856 (May 8, 1992) and 16 U.S.C. § 1533(b)(5)(B), App. E-6.

In direct response to comments on the proposed listing that the Service lacked comprehensive vernal pool sampling data, the Service relied, in the final rule, on a 1991-1993 field survey known as the "Simovich Study" that the Service had received during the comment period. The Service touted the study as the "best scientific and commercial data available" and, according to the district court, cited it extensively for "the important proposition that fairy shrimp are rare within their ranges." App. C-17. But the Service never circulated the study for public review and comment.

A. The Statutory Requirement

The Administrative Procedure Act provides that final agency action will be held unlawful and set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or if the agency action was taken "without observance of procedure required by law." 5 U.S.C. § 706(2)(A) and (D), App. D-1. The APA itself mandates that administrative action follow a procedure designed to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments" and, after consideration of the matter, "incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(b)-(c), App. D-1. This requirement was incorporated into the ESA by reference. *See* 16 U.S.C. § 1533(b)(4), App. E-6.

The purpose of this requirement is to provide for meaningful public participation in the rule-making process. *See Rybachek v. EPA*, 904 F.2d 1276, 1286 (9th Cir. 1990). But that purpose is defeated when, as in this case, a significant scientific study on which the final rule substantially relied (and challenged by Petitioners in this litigation) is not made available for comment so that interested persons, such as Petitioners here,

have an opportunity to submit "written data, views, or arguments" on information that indisputably formed a basis for the final rule.

Under the ESA, a determination to list a species as endangered or threatened must be based "solely on the basis of the best scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A). This requirement heightens the need for notice and comment because without the benefit of such review, the agency could never know whether the data on which it relies is "the best scientific and commercial data available."

Also, in the ESA, Congress imposed additional procedural requirements on proposals to list beyond the notice and comment requirements mandated by the APA.

The ESA directs that at least 90 days before the effective date of the listing, that the Secretary must publish notice and the complete text of the proposed rule in the Federal Register, give actual notice to the state agency and the county in each state in which the species is believed to occur, and invite the comments of such agency thereon. 16 U.S.C. § 1533(b)(5)(A)(i)-(ii), App. E-6. Also, a summary of the proposed rule must be published in a newspaper in each area in which the species exists and a public hearing must be promptly held upon the request of any person. *Id.* § 1533(b)(5)(D), (E), App. E-6-7.

Thus, Congress afforded interested parties, including Petitioners, special procedural rights in the listing process. Not only did Congress incorporate the expansive rule-making requirements of the APA into the ESA, but that body expressly enlarged those requirements to increase public awareness and participation in the listing determination. But, in this case, the lower court did not recognize the added importance Congress placed on notice and comment. Instead, the court adopted a standard designed to lessen participation in the listing process by interested parties. A Writ of Certiorari should therefore be granted.

B. The Procedural Conflict

The lower court acknowledged that the Service "relie[d] heavily on the Simovich Study" and that the study was cited frequently in the final rule. App. B-7. The court even documented the significance of the study noting the Service's concession that the study was the most comprehensive study of California vernal pools ever attempted. *Id.*

Nevertheless, the lower court ruled that no public comment was necessary because the "Simovich Study" did "no more than provide support for the same decision [the Service] had proposed to take." App. B-8. But that cannot be the law. Under this standard, no new data need be circulated for public review and comment unless it changes the proposed decision. As the lower court put it:

> Essentially, the proposal advanced for comment a hypothesis and some supporting data. The Simovich study provided additional support for that hypothesis—indeed, better support than was previously available—but it did not reject or modify the hypothesis such that additional comment was necessary.

App. B-8.

This puts the cart before the horse. This standard presumes that a decision has been made at the proposal stage before the decision maker has even considered all the data. Unless and until the study is made available to test and refute and to compare and contrast to the other data, it cannot be known whether the study merely provides cumulative information or new insights that may undermine the original hypothesis. It's only the court's opinion that the "Simovich Study" supports the proposal to list. Petitioners believe otherwise. Among other things, the study area was too small to provide representative data. As the lower court would have it,

the Service could completely mischaracterize new data, arguing it supported the proposal, and immunize itself from both public and judicial review by sticking with its proposal.

Moreover, the standard adopted by the District of Columbia Circuit assumes the public stands in an adversarial role as against the agency and the only purpose for public review is to challenge the proposal. This is shortsighted because public review serves an important informational goal. As the district court in this case noted, the notice and comment requirement serves at least three purposes: (1) to ensure that agency regulations are tested by exposure to diverse public comment, (2) to ensure fairness and opportunity to be heard, and (3) to enhance judicial review. App. C-15. Clearly, the policies underlying the notice and comment requirement go beyond just testing the data. These policies suggest a need for an open and fair process, which Congress took pains to ensure with express language in the ESA that expands opportunity for public involvement in the listing decision. *See* 16 U.S.C. § 1533(b)(5), App. E-6. This requires, however, a stricter reading of the statutory mandate for meaningful public participation than the lower court was willing to give.

The decision below presents a question of exceptional importance because it raises the bar for triggering public notice and comment, encourages preconceived decision making, and precludes meaningful public participation in the rule-making process. Even the district court conceded that "the study should have been made available for notice and public comment," although the Court was reluctant to invalidate the final rule. Moreover, the decision below directly conflicts with *Idaho Farm Bureau Federation*, 58 F.3d at 1392, in which the Ninth Circuit held on nearly identical facts that the listing of an endangered species was defective because a scientific study, much like the "Simovich Study" in this case, was not circulated for public input.

In *Idaho Farm Bureau Federation*, the Service proposed listing the Bruneau Hot Springs Snail as an endangered species. The snail is a very small species that is found only in a narrow band of thermal springs in southwest Idaho. *Id.* at 1395. Like the fairy shrimp, the snail's habitat was reportedly at risk but little was known about the species. Two Senators wrote a letter to the Director of the Service expressing concerns that the listing would have "devastating effects" on the local agricultural community and suggested "listing would be meaningless to protection of the snail's natural habitat if the hydrologic cause of the habitat's decline is not fully understood." *Id.* at 1396. The Senators urged further analysis and offered to secure funding for hydrological studies. The Director agreed to the delay to allow the studies to be conducted. One study, relating to declining spring flows, was put in the hands of the Service only after the notice of the proposed listing. That study supported the decision to list the snail and was cited in the final rule. But, as in the present case, the study was not provided for public review and comment.

On review in the Ninth Circuit, the court held the final rule invalid under the APA and ESA because the Service made its listing decision "without observance of procedure required by law." *Id.* at 1404. The basis for that decision was threefold: (1) the study filled data gaps in the Service's claim that spring flows had decreased from historic levels; (2) the study provided unique data that was not duplicated in other reports; and (3) the necessity for notice and opportunity for comment on the study "was greatly heightened because FWS relied largely on the . . . study to support its final rule." *Id.* at 1403.

The Ninth Circuit could not have painted a clearer picture of the circumstances in the present case. As in *Idaho Farm Bureau Federation*, the Service received a letter from a member of Congress urging the Service to delay listing until further information on species population could be gathered.

> Many commenters, including the California Department of Transportation and Congressman Wally Herger, requested the Service delay or not list the five species because they believed additional distributional and ecological data are needed to determine the "true" status of these animals.

59 Fed. Reg. at 48,141.

Also, other commenters stated the survey work on which the proposed rule was based was deficient and that this lack of information "would result in a procedurally inadequate listing." *Id.* Still others pointed out that the Service had not conducted a random field survey and failed to correctly delineate the distribution of the fairy shrimp. *Id.* "To support the need for further field work, one commenter cited 18 records of the vernal pool fairy shrimp and 30 records of the California linderiella that were not included in this proposed rule." *Id.*

In direct response to these many objections, the Service cited the "Simovich Study" that was not available for public review and comment before the final listing. For the first time, after the close of the comment period, the Service pointed to what it characterized as a "credible" random field survey of fairy shrimp distribution: "Scientifically credible data on the status of the five crustaceans was collected in a random 322 kilometer (200 mile) north-south transect in the Sacramento Valley from Fall River in Shasta County to Jepson Prairie in Solano County (Simovich *et al.* 1992)." *Id.*

Although critically deficient, the "Simovich Study" was put forward by the Service as the most complete study of California vernal pools to date. It did more, therefore, than merely supplement or confirm existing data. Like the hydrological study in *Idaho Farm Bureau Federation*, the "Simovich Study" filled gaps in the Service's claim that the fairy shrimp were either endangered or threatened and must be listed. According to the district court, the Service cited the "Simovich

Study" extensively for "the important proposition that fairy shrimp are rare within their ranges." App. C-17.

The "Simovich Study" also provided unique data that was not duplicated in other reports:

> The Service concedes that the study is "the first long-term multidisciplinary study" and "the most scientifically based and well-documented professional study" of California vernal pools ever attempted, [and] that it is "more comprehensive than any previous study."

App. B-7.

Additionally, the Service conceded and the lower court found that "the final rule relied substantially on the findings in the Simovich Study." *Id.* The "Simovich Study," therefore, met the three-fold criteria established by the Ninth Circuit for invoking public notice and comment under the APA and ESA; the study filled data gaps, provided unique information, and the Service relied largely on the study to support its final rule.

But the Ninth Circuit notice and comment standard directly conflicts with the standard adopted by the D.C. Circuit. Whereas in the D.C. Circuit the "Simovich Study," and data like it, need not to be made available for public review because it does "no more than provide support for the same decision [the Service] had proposed to take," in the Ninth Circuit such data would have been circulated for public comment for the reasons just described.

There are other differences between these decisions as well. The Ninth Circuit also declared in *Idaho Farm Bureau Federation* that "[o]pportunity for public comment is particularly crucial when the accuracy of important material in the record is in question." *Idaho Farm Bureau Federation*, 58 F.3d at 1403. Such is the case here. Petitioners have challenged the accuracy and adequacy of the "Simovich Study"

in the course of this litigation. For example, Petitioners question the purported randomness of the study noting the vernal pool survey was limited to only 14 sites along a 22-mile transect of the Central Valley whereas the Service relied on this data to conclude the fairy shrimp are at risk of extinction throughout their entire range. *See* Opening Brief for Appellants in the court below at 20-21. Quite simply, the Study is unreliable and does not support the Service's conclusions.

Adding to the crucial need for meaningful comment by interested parties is the fact that the "Simovich Study" did not undergo formal peer review and the ESA mandates that a listing determination rest "solely on the basis of the best scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A), App. E-3. The Panel took that provision to mean that the Service has no affirmative duty to fill in the informational gaps on the status of the fairy shrimp but may rely entirely on existing data, or the lack thereof:

> Assuming that studies the Service relied on were imperfect, that alone is insufficient to undermine those authorities' status as the "best scientific . . . data available." Appellants misread § 1533(b)(1)(A): the Service must utilize the "best scientific . . . data *available*," not the best scientific data *possible*.

App. B-9 (emphasis in original).

The problem with this interpretation is that it can't be known whether the data is the best available until it has been reviewed. This interpretation also encourages ignorant rule making and authorizes the listing of a species as endangered or threatened with little or no data. But the listing of a species has immense repercussions in the affected communities. For example, Petitioners in this case have been required to hold up or cancel development projects worth millions of dollars. But they are not alone. The plight of hundreds of farm families in

Oregon and California have been widely published. Close to 1400 farm families have been denied virtually all of their contractual irrigation water from the Klamath Project this year in favor of listed fish. As a result, many are likely to lose their livelihood. *See* Eric Brazil, *Farmers Protest Loss of Water*, S.F. Chron., May 8, 2001, at A3. Surely, the public interest and procedural mandates of the law are best served by providing the public a meaningful opportunity to review and comment on significant information that forms the basis for a listing determination—an opportunity denied Petitioners in this case.

The importance of public notice and comment recognized by the Ninth Circuit in *Idaho Farm Bureau Federation* cannot be reconciled with the limited role allowed Petitioners and other interested persons by the lower court in this case. That conflict raises a question of national importance that requires resolution by this Court.

CONCLUSION

For the reasons stated above, this Court should grant the Petition for Writ of Certiorari.

DATED: October, 2001.

Respectfully submitted,

LAWRENCE R. LIEBESMAN
RAFE PETERSEN
Holland & Knight LLP
2099 Pennsylvania Avenue,
N.W., Suite 100
Washington, DC 20006-6801
Telephone: (202) 955-3000
Facsimile: (202) 955-5564

M. REED HOPPER
Counsel of Record
ROBIN L. RIVETT
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Petitioners

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United States Court of Appeals
for the District of Columbia

No. 00-5143

September Term, 2000
95cv00726
Filed On: July 13, 2001

Building Industry Association
of Superior California, et al.,
Appellants

v.

Gale A. Norton, Secretary
of the Interior, et al.,

Appellees.

BEFORE: Edwards, Chief Judge; Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges.

ORDER

Upon consideration of petitioners' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

By: /s/ Robert A. Bonner
Deputy Clerk

Appendix B–1

LEXSEE 247 F.3d 1241

BUILDING INDUSTRY ASSOCIATION OF SUPERIOR CALIFORNIA, ET AL., APPELLANTS v. GALE A. NORTON, SECRETARY OF THE INTERIOR, ET AL., APPELLEES

No. 00-5143

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

247 F.3d 1241; *2001 U.S. App. LEXIS 8513; 52 ERC (BNA) 1257*

April 9, 2001, Argued

May 8, 2001, Decided

PRIOR HISTORY:

[**1] Appeal from the United States District Court for the District of Columbia. (95cv0726).

DISPOSITION:

Affirmed.

COUNSEL:

Lawrence R. Liebesman argued the cause for appellants. With him on the briefs was Rafe Petersen.

Elizabeth Ann Peterson, Attorney, United States Department of Justice, argued the cause for the federal appellees. With her on the brief were John Cruden, Deputy Assistant Attorney General, and Ellen J. Durkee, Attorney.

Neil Levine argued the cause and filed the brief for the non-federal appellees.

Robin L. Rivett and Anne M. Hayes were on the brief for amici curiae Pacific Legal Foundation, et al., in support of appellants. Reed Hopper entered an appearance.

JUDGES:

Before: SENTELLE and HENDERSON, Circuit Judges, and SILBERMAN, Senior Circuit Judge. Opinion for the Court filed by Senior Circuit Judge SILBERMAN.

OPINION BY:

SILBERMAN

OPINION:

[*1243] SILBERMAN, *Senior Circuit Judge*: Appellants Building Industry Association, et al., sought review of the Fish and Wildlife Service's listing of various fairy shrimp species as endangered or threatened. They now challenge a district court decision denying their motion for summary judgment. Determining that we have jurisdiction, we affirm **[**2]** the denial.

I.

In those regions of California with Mediterranean climates, one finds shallow depressions called "vernal pools" that fill with rainwater in fall and winter only to evaporate in spring. In these pools reside numerous indigenous aquatic invertebrates that have evolved to survive in the pools' variable environmental conditions. In 1992 the Fish and Wildlife Service proposed to list as endangered species five tiny crustaceans resident in California's vernal pools: the vernal pool fairy shrimp, Conservancy fairy shrimp, longhorn fairy shrimp, California linderiella, and vernal pool tadpole shrimp (collectively, "fairy shrimp"). The proposed rule specified

actual and threatened destruction of vernal pools as a justification for the listing.[1]

After a comment period, the Service withdrew the proposal to list the California linderiella. It listed vernal pool fairy **[**3]** shrimp as threatened and the three remaining species as endangered. Though the Endangered Species Act (ESA) requires the Service to designate "critical habitats" for listed species "to the maximum extent prudent and determinable," the Service declined to make designations on the ground that so doing would put the listed species at risk of vandalism.[2]

The Service's decision then began its long and bumpy journey to appellate review. Appellants challenged the listing decision in the district court, asserting violations of the ESA, the Administrative Procedure Act (APA), and the Constitution. Along with contesting on various grounds the general validity of the listing decision, appellants took issue with the Service's failure to **[**4]** designate critical habitats. In response to cross-motions for summary judgment, the district court in July 1997 granted summary judgment to the Service on all claims except the critical habitat claim. On that claim, the court held that the failure to designate critical habitat was arbitrary and capricious and remanded to the Service either for designation or for explanation why designation was not prudent.[3]

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[1] *See Proposal to Determine Endangered Status for Fairy Shrimp*, 57 Fed. Reg. 19,856, 19,858 (proposed May 8, 1992).

[2] 16 U.S.C. § 1533(a)(3) (2000); *see Determination of Endangered Status for Fairy Shrimp*, 59 Fed. Reg. 48,136, 48,151 (Sept. 19, 1994); *Withdrawal of Proposal as to the California Linderiella*, 59 Fed. Reg. 48,154 (Sept. 19, 1994).

[3] *See Bldg. Indus. Ass'n v. Babbitt*, 979 F. Supp. 893, 905-06, 908 (D.D.C. 1997).

While the critical habitat remand was pending, the district court certified the listing claims under Rule 54(b). An appeal of that portion of the decision followed, but we dismissed for lack of jurisdiction. The listing claims and the critical habitat claim arose out of the same body of law and fact, meaning that the listing appeal would be intertwined with a possible critical habitat appeal. With the threat of such a piecemeal appeal looming, and without an explanation **[*1244]** from the district court as to why **[**5]** such an approach was desirable, we held that we lacked jurisdiction.[4] In March 1999, the district court reviewed additional record citations the Service had provided in support of its conclusion that critical habitat designations would be imprudent. It ruled that these materials did not adequately support the Service's conclusion, vacated the Service's decision not to designate critical habitats, and remanded once again. According to the district court, the decision constituted a final judgment on all claims.

Appellants brought a second appeal of the listing decision. We ordered the parties to address whether a final decision existed because the critical habitat remand was still before the Service, which had not itself appealed. In an attempt to resolve any possible jurisdictional infirmity, appellants decided to abandon litigation of the critical habitat claim, leaving for resolution only the listing **[**6]** claims, which were clearly final. To that end, appellants moved the district court to amend its March 1999 judgment remanding to the Service or in the alternative for leave to amend their complaint to delete the critical habitat claim. The district court determined that due to the pending appeal it had no jurisdiction to consider the motion; it also indicated that if it were to regain jurisdiction, it would deny the motion to amend the judgment but grant leave to

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[4] *See Bldg. Indus. Ass'n v. Babbitt*, 333 U.S. App. D.C. 190, 161 F.3d 740 (D.C. Cir. 1998).

amend the complaint.[5] Soon thereafter appellants moved this court to dismiss their appeal, which we did. The district court then granted appellants' motion to strike from their complaint the critical habitat claim, the only claim on which they had prevailed. Appellants immediately brought this appeal, their third attempt to gain review of the district court's dismissal of the listing claims. We once again ordered the parties to address our jurisdiction.

II. [7]**

Appellants allege numerous errors in the district court's decision. They argue that the rule's heavy reliance on a study, the so-called "Simovich study," not made available during the comment period violated the APA, as did the rule's enumeration of fairy shrimp populations in terms of vernal pool complexes rather than individual pools. They further contend that the listing was not supported by the best available scientific data, as required by the ESA, and that the Service misapplied its own policy on independent peer review. The nonfederal appellees, public interest groups that intervened below ("intervenors"), argue that we lack jurisdiction because no final judgment exists. We address that argument before reaching the merits.

A.

Intervenors' jurisdictional argument is subtle. Absent appeal by the agency, an order remanding to an agency for further proceedings is not an appealable final decision even where the district court dismisses the case. *See NAACP v. United States Sugar Corp.*, 318 U.S. App. D.C. 58, 84 F.3d 1432, 1436 (D.C. Cir. 1996). Before amendment of the complaint, therefore, the critical habitat remand pending before the Service prevented our **[**8]** assertion of appellate jurisdiction over the listing claims. Accordingly, appellants amended their complaint to omit the critical habitat claim. Though the 1997 decision was not final

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[5] *See Bldg. Indus. Ass'n v. Babbitt*, 70 F. Supp. 2d 1 (D.D.C. 1999).

at the time it was entered, under the doctrine of cumulative finality the dismissal of the only claim **[*1245]** that survived that decision retroactively rendered it final and appealable. *See* 15A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3914.9, at 631-42 (2d ed. 1992); *cf. Sacks v. Rothberg*, 269 U.S. App. D.C. 353, 845 F.2d 1098, 1099 (D.C. Cir. 1988) (per curiam).

Intervenors argue, however, that the district court abused its discretion in allowing amendment of the complaint after judgment. If that were so, the March 1999 decision remanding to the Service would still be in force, and there would be no final judgment for this court to review. Ordinarily post-judgment amendment of a complaint under Rule 15(a) requires reopening of the judgment pursuant to Rule 59(e) or 60(b). *See Cassell v. Michaux*, 99 U.S. App. D.C. 375, 240 F.2d 406, 407-08 (D.C. Cir. 1956). This prevents litigants from resurrecting claims on which they have **[**9]** lost. *Cf. Firestone v. Firestone*, 316 U.S. App. D.C. 152, 76 F.3d 1205, 1207-08 (D.C. Cir. 1996) (per curiam). But that concern is absent here: appellants prevailed on the claim in question, and dropped it only so that they might appeal dismissal of other claims.

Appellants respond (and the Service agrees) that because the remand was not a *final* judgment, no motion under Rule 59 or 60 was necessary to amend the complaint to abandon claims they no longer wished to pursue. We agree. The general requirement of a Rule 59 or 60 motion prior to post-judgment amendment is employed to serve the judicial policy "favoring finality of judgments and the expeditious termination of litigation." *See* 6 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 1489, at 694 (2d ed. 1990). Neither goal is served by requiring a Rule 59 or 60 motion here. Indeed, it would be passing strange if in order to secure appeal of the claims on which they lost appellants were forced to litigate to finality claims on

which they preliminarily prevailed and that they now wish to abandon.[6] **[**10]**

B.

As noted, the rule relies heavily on the Simovich study, which was released after the proposal and which the agency received only during the comment period. The study was therefore not among the materials published for public comment. Appellants argue that the Service's failure to seek comment on the study violated the APA.

It is not disputed that the Service placed great weight on the Simovich study. It is cited frequently in the rule, which touted it as "scientifically credible." 59 Fed. Reg. at 48,141. The Service concedes that the study is "the first long-term multidisciplinary study" and "the most scientifically based and well-documented professional study" of California vernal pools ever attempted, that it is "more comprehensive than any previous study," and that "the final rule relied substantially on the findings in the Simovich study."

The Service nonetheless contends that it was not required to publish the Simovich study for public comment, and we agree. The APA generally obliges **[*1246]** an agency to publish for comment the technical studies and data on which it relies. *See Solite Corp. v. EPA*, 293 U.S. App. D.C. 117, 952 F.2d 473,

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[6] Intervenors argue that they are prejudiced by appellants' amendment because they are forced to relitigate the dropped claim in a separate suit. But the inability of a third party to rely on the disposition of a claim cannot force a plaintiff to litigate what it wishes to drop. In any event, one intervenor recently sued the Service to compel designation of critical habitats for the four listed species. The district court has granted summary judgment to that intervenor and ordered the Service to designate critical habitats by August 8, 2001. *See Butte Envtl. Council v. White*, No. Civ. S-00-0797 WBS GGH (E.D. Cal. Feb. 8, 2001).

484 (D.C. Cir. 1991) [**11] (per curiam). But to avoid "perpetual cycles of new notice and comment periods," *Ass'n of Battery Recyclers v. EPA*, 341 U.S. App. D.C. 78, 208 F.3d 1047, 1058 (D.C. Cir. 2000), a final rule that is a logical outgrowth of the proposal does not require an additional round of notice and comment even if the final rule relies on data submitted during the comment period. *See Int'l Fabricare Inst. v. EPA*, 297 U.S. App. D.C. 331, 972 F.2d 384, 399 (D.C. Cir. 1992) (per curiam); *Solite*, 952 F.2d at 484. Such is the case here. The Simovich study, while the best available, only confirmed the findings delineated in the proposal. In relying on it, the Service "did no more than provide support for the same decision it had proposed to take." *Int'l Fabricare*, 972 F.2d at 399. Essentially, the proposal advanced for comment a hypothesis and some supporting data. The Simovich study provided additional support for that hypothesis–indeed, better support than was previously available–but it did not reject or modify the hypothesis such that additional comment was necessary. *See Solite*, 952 F.2d at 484.

Appellants next [**12] object to the rule because it counts fairy shrimp populations by the number of vernal pool complexes, not the number of individual vernal pools, in which they reside. *See* 59 Fed. Reg. at 48,137. (A pool complex is a group of individual pools that, due to their proximity, are susceptible to the same threats.) Appellants insist that the proposal never put the public on notice of the "complexes methodology" or of the definition of complexes.[7]

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[7] Appellants' brief never explains why they were disadvantaged by the Service's reliance on pool complexes. At oral argument appellants suggested that reliance on complexes reduced the number of discrete groups of fairy shrimp, meaning that a threat to a single shrimp grouping threatens a greater fraction of that species. Their argument remains somewhat obscure.

But the use of complexes to measure fairy shrimp populations was no surprise: the proposal itself used the term five times. *See* 57 Fed. Reg. at 19,856, 19,858, 19,859. Moreover, nothing in the final rule's use of complexes constituted a deviation from the proposed rule. The proposal posited danger to existing fairy shrimp populations, which were discussed in terms of both individual pools and pool complexes; consistent with the proposal, the final rule found danger to existing fairy shrimp populations, which were measured—most accurately, according to the rule—in terms of pool complexes. The final rule's measurement of populations solely in terms of complexes, after the proposal's uncommitted use of both methodologies, **[**13]** was a tightening of the rule's reasoning, but it was nonetheless a logical outgrowth of the proposal. Appellants have not pointed to any way in which the sharpened focus on complexes changed the rule's reasoning or conclusion.

Appellants also claim that methodological flaws in the Simovich study and other relied-upon authorities mean that the rule was not based on the "best scientific and commercial data available," as required by 16 U.S.C. § 1533(b)(1)(A). Yet as the district court noted, appellants "have pointed to no data that was omitted from consideration." 979 F. Supp. at 903. Assuming that studies the Service **[**14]** relied on were imperfect, that alone is insufficient to undermine those authorities' status as the "best scientific . . . data available." Appellants misread § 1533(b)(1)(A): the Service must utilize the "best scientific . . . data *available*," not the best scientific data *possible*. The Service **[*1247]** may not base its listings on speculation or surmise or disregard superior data, *cf. Bennett v. Spear*, 520 U.S. 154, 176, 137 L. Ed. 2d 281, 117 S. Ct. 1154 (1997); *City of Las Vegas v. Lujan*, 282 U.S. App. D.C. 57, 891 F.2d 927, 933 (D.C. Cir. 1989), but absent superior data—and appellants point to none—occasional imperfections do not violate § 1533(b)(1)(A).

Finally, we reject appellants' claim that the listing's validity is undermined by its failure to comply with the Service's peer review policy. To be sure, the listing was not subjected to the *present* peer review procedure, which requires that "during the comment period" the Service obtain three independent specialists' opinions on the merits of the decision and reprint them in the listing. *See* Peer Review Policy Statement, 59 Fed. Reg. 34,270 (July 1, 1994). But the current **[**15]** peer review policy came into force 22 months after the close of the fairy shrimp comment period. Appellants point out that a March 1995 letter from a Service official to Congressman Richard Pombo stated that "in conformance with policy (59 FR 34270), the Service sought scientific peer review of the listing proposal." Letter from George T. Frampton, Jr., Assistant Secretary for the Service, to Hon. Richard Pombo 1 (March 10, 1995). That statement may have misled the congressman as to the Service's compliance with the specific peer review procedures promulgated in 1994, but the listing was in fact subject to peer review that was intense though less formal than is currently required. In any event, appellants suggest no basis on which the letter would render the later-enacted policy statement retroactively binding on an already-concluded comment period.[8]

[16]**

* * *

The denial of appellants' motion for summary judgment is

Affirmed.

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[8] Appellants also argue that this application of the ESA exceeds Congress' Commerce Clause power and that the Service misapplied the ESA's statutory factors. According to appellants' brief, however, the former claim fails under *National Assoc. of Home Builders v. Babbitt*, 327 U.S. App. D.C. 248, 130 F.3d 1041 (D.C. Cir. 1997), and is asserted only to preserve the possibility of en banc review. Appellants conceded at oral argument that the latter claim was not pressed below.

Appendix C–1

No.

BUILDING INDUSTRY ASSOCIATION OF SUPERIOR CALIFORNIA, et al., Plaintiffs,

v.

BRUCE BABBITT, et al., Defendants,

ENVIRONMENTAL DEFENSE CENTER and BUTTE ENVIRONMENTAL COUNCIL, Defendant-Intervenors.

Civil Action No. 95-0726 (PLF)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

979 F. Supp. 893; 1997 U.S. Dist. LEXIS 14768
July 25, 1997, Decided
July 25, 1997, Filed

DISPOSITION:

[**1] Plaintiffs' motion for summary judgment GRANTED in part and DENIED in part. Portion of the Secretary's decision REMANDED to the Fish and Wildlife Service. Defendants' motion for summary judgment GRANTED in part and DENIED in part. JUDGMENT entered for defendants; and defendant-intervenors' motion for summary judgment GRANTED in part and DENIED in part. JUDGMENT entered for defendant- intervenors.

COUNSEL:

For Plaintiffs: Lawrence R. Lilebesman, Linowes & Blocher, LLP, Silver Spring, MD.

For Defendants: Lyn Jacobs, Department of Justice, Washington, DC.

For Defendant/Intervenors: Anne Spielberg, Harmon, Curran & Spielberg, Washington, DC.

For Defendant/Intervenors: Marc Chytilo, Environmental Defense Center, Santa Barbara, CA.

For Defendant/Intervenors: Neil Levine, University of Denver, Denver, CO.

For Amici: Robin L. Rivett, Mark T. Gallagher, Sacramento, CA.

JUDGES:

PAUL L. FRIEDMAN, United States District Judge.

OPINION BY:

PAUL L. FRIEDMAN

OPINION:

[*896] OPINION

I. BACKGROUND

"Fairy shrimp" are tiny crustaceans found primarily, although not exclusively, in California's Central Valley region. Named for their delicate elongated bodies and wing-like thrashing legs, **[**2]** fairy shrimp are endemic to "vernal pools," sometimes known as seasonal wetlands, which are seasonally wet, isolated water bodies that pond in the winter and spring and evaporate during the summer. Fairy shrimp, the collective term for several similar shrimp species, constitute an important link in the vernal pool ecosystem, providing food for other animals and maintaining various aspects of the vernal

pool ecological balance.[1] As a general matter, vernal pool habitat stretches from southern Oregon down the west coast into Baja California, although fairy shrimp are not found throughout this region. Final Rule, 59 Fed. Reg. at 48136. Since vernal pools occur throughout the farmlands of the Central Valley as well as in other areas of heavy agricultural and urban economic development, much of the fairy shrimp's habitat has been destroyed over the years, and it continues to disappear at a rate of about two to three percent per year. *Id.* at 48137. **[**3]**

The fate of these little creatures and their hotly contested habitat drives the instant case. On September 19, 1994, the Fish and Wildlife Service ("FWS") of the United States Department of the Interior exercised its authority under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531, *et seq.*, to list as endangered three different species of fairy shrimp—the Conservancy fairy shrimp (Branchinecta conservatio), the longhorn fairy shrimp (Branchinect longiantenna) and the vernal pool tadpole shrimp (Lepidurus packardi)—and to list as threatened one species of fairy shrimp—the vernal pool fairy shrimp (Branchinecta lynchi). Final Rule, 59 Fed. Reg. 48136 (Sept. 19, 1994).[2] The **[*897]** FWS based its listing decision on its findings that fairy shrimp habitat has been and continues to be destroyed, that a number of specific planned development projects would further eliminate known vernal pool complexes,

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[1] Final Rule: Determination of Endangered Status for the Conservancy Fairy Shrimp, Longhorn Fairy Shrimp, and the Vernal Pool Tadpole Shrimp; and Threatened Status for the Vernal Pool Fairy Shrimp ("Final Rule"), 59 Fed. Reg. 48136, 48137 (Sept. 19, 1994), Administrative Record ("A.R.") at 186.

[2] In its Final Rule, the FWS also withdrew the California linderiella (Linderiella occidentalis), a species of fairy shrimp that initially had been proposed for listing in the Proposed Rule. Final Rule, 59 Fed. Reg. at 48136.

and that fairy shrimp are scarce within their remaining habitat. *Id.* at 48147-51. **[**4]**

Plaintiffs challenge the listing of these four species of fairy shrimp, arguing that the listings violate the ESA, the Administrative Procedure Act, 5 U.S.C. §§ 501, *et seq.*, and the Fifth Amendment, the Tenth Amendment and the Commerce Clause of the United States Constitution.[3] Defendants and defendant-intervenors maintain that the listings are well supported by law and the best available science, and that in any event plaintiffs lack standing to challenge the listings because their interests do not fall within the zone of interests that Congress intended to protect with the ESA. The case is before the Court on cross-motions for summary judgment. **[**5]**

II. STATUTORY FRAMEWORK

An "endangered species" is "any species which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). A "threatened species" is "any

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[3] Plaintiffs are the Building Industry Association of Superior California ("BIA"), a nonprofit corporation representing approximately 625 businesses in the California construction industry and their employees; Marvin L. Oates, a real estate developer from Sacramento, California and a member of the BIA; Sacramento County, California; the Sacramento Metropolitan Chamber of Commerce; and the Rescue Union School District, California. Defendants are the United States Department of the Interior; Bruce Babbitt, Secretary of the Interior; the Fish and Wildlife Service; and Molly Beattie, Director of the FWS. Secretary Babbitt and Director Beattie are sued in their official capacities only.

Intervening on behalf of defendants are the Environmental Defense Center and the Butte Environmental Council. The following organizations and governmental entities jointly filed an amicus brief in support of plaintiffs: the Pacific Legal Foundation; the California Farm Bureau Federation; the California Cattlemen's Association; El Dorado County, California; and Placer County, California.

species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20). "To the maximum extent practicable," within 90 days after receiving a petition of an interested person to list a species, the Secretary of the Department of the Interior shall make a finding whether the listing may be warranted. 16 U.S.C. § 1533(b)(3)(A). If the listing may be warranted, within 12 months of receiving the petition the Secretary shall make a determination either that the petitioned action is not warranted, warranted, or warranted but precluded. 16 U.S.C. § 1533(b)(3)(B).[4] In so doing, the Secretary, through the FWS,

> shall . . . determine whether any species is an endangered species or a threatened species because of any of the following factors: (A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, **[**6]** or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.

16 U.S.C. § 1533(a)(1). The Secretary shall make such determinations "solely on the basis of the best scientific and commercial data available . . . ." 16 U.S.C. § 1533(b)(1)(A).

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[4] The Secretary may determine that an action is "warranted but precluded" where "the immediate proposal and timely promulgation of a final regulation implementing the petitioned action . . . is precluded by pending proposals to determine whether any species is an endangered species or a threatened species" and "expeditious progress is being made to add qualified species to either of the lists published under subsection (c) of this section and to remove from such lists species for which the protections of this chapter are no longer necessary." 16 U.S.C. § 1533(b)(3)(B)(iii).

On November 19, 1990, Roxanne Bittman petitioned the FWS to list the Conservancy **[**7]** fairy shrimp, the longhorn fairy shrimp, the vernal pool fairy shrimp, and the California linderiella as endangered species. On April 28, 1991, Dee Warenycia petitioned the FWS to list the vernal pool tadpole shrimp as endangered. The FWS found that the petitions "may be warranted," 56 Fed. Reg. 426968 (Aug. 30, 1991), and published a Proposed Rule proposing to list the five species as endangered. 57 Fed. Reg. 19856 (May 8, 1992), A.R. at 480. An initial public comment **[*898]** period lasted from May 8 through July 7, 1992, and a public hearing was held on August 31, 1992. The public comment period was reopened and extended until September 18, 1992. 57 Fed. Reg. 36380 (Aug. 13, 1992). On September 18, 1992, Representative Vic Fazio organized a public meeting in Red Bluff, California, which representatives of the FWS also attended. By the end of the public notice and comment period, the FWS had received 117 comments from public and private parties including, inter alia, the California Department of Parks and Recreation, the California Department of Fish and Game, and 41 private parties, all supporting the listing; it received comments from 34 private parties (including Sugnet and Associates, **[**8]** a consultant retained by plaintiff BIA), and two Congresspersons opposing the listing. 59 Fed. Reg. at 48139.

On February 9, 1994, conservation groups brought suit to compel the Secretary to list the fairy shrimp species as endangered. *Environmental Defense Center v. Babbitt*, Case No. 94-0788, Complaint (N.D. Cal. Feb. 9, 1994), A.R. at 19. In compliance with an agreement reached in settlement of that suit, the FWS published its Final Rule on September 19, 1994. *See* A.R. at 185. The FWS determined that three fairy shrimp species were endangered—the Conservancy fairy shrimp, the longhorn fairy shrimp and the vernal pool tadpole shrimp—and that one species, the vernal pool fairy shrimp, was threatened. It based its determination primarily on the present and

threatened destruction, modification and curtailment of the fairy shrimp's habitat and range, the inadequacy of existing regulatory mechanisms, and other natural and man-made factors. 59 Fed. Reg. at 48147-50; *see* 16 U.S.C. § 1533(a)(1).

III. STANDARD OF REVIEW

Judicial review of agency decisions under the ESA is governed by Section 706 of the APA. 5 U.S.C. § 706; *see City of Las Vegas v. Lujan*, 282 U.S. **[**9]** App. D.C. 57, 891 F.2d 927, 932 (D.C. Cir. 1989). Agency actions may be set aside only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The Supreme Court has described the principles governing review as follows:

> The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choices made. . . . The reviewing court . . . may not supply a reasoned basis for the agency's action that the agency itself has not given. [The court] will, however, uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.

Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co., 463 U.S. 29, 43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983) (internal quotations and citations omitted). Review is based on the entire administrative record. *Camp v. Pitts*, 411 U.S. 138, 142, 36 L. Ed. 2d 106, 93 S. Ct. 1241 (1973); *see San* **[**10]** *Luis Obispo Mothers For Peace v. Nuclear Regulatory Commission*, 243 U.S. App. D.C. 68, 751 F.2d 1287, 1325-26

(D.C. Cir 1984).[5] Although the Court may not substitute its judgment for that of the agency, *Marsh v. Oregon Natural Resources Defense Council*, 490 U.S. 360, 378, 104 L. Ed. 2d 377, 109 S. Ct. 1851 (1989), the Court's review must nevertheless be "searching and careful." *Id.*

In this case, much of the dispute revolves around the defendants' scientific conclusions about the state of the fairy shrimp species. The Supreme Court has made clear that under such circumstances where a determination "requires a high level of technical expertise, [a court] must defer to the informed discretion of the responsible federal agencies." *Marsh v. Oregon Natural Resources Defense Council*, 490 U.S. at 377; *see Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 **[**11]** U.S. 87, 103, 76 L. Ed. 2d 437, 103 S. Ct. 2246 (1983) ("When examining this kind of scientific determination . . . a reviewing **[*899]** court must generally be at its most deferential."). In the same vein, "when specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Marsh v. Oregon Natural Resources Defense Council*, 490 U.S. at 378.

IV. PLAINTIFFS' STANDING

Defendants and defendant-intervenors argue that plaintiffs lack Article III standing because they have failed to articulate injury in fact. Defendant-intervenors also argue that plaintiffs lack standing under the ESA and under the APA because they have asserted no interest in protecting the fairy shrimp and therefore do not fall under the "zone of interests" protected by Congress in passing the ESA. The Court concludes that plaintiffs have standing under both tests.

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[5] By Memorandum Opinion and Order of October 30, 1995, the Court granted in part plaintiffs' motion to supplement the administrative record.

A. Article III Standing

In order to withstand defendants' and defendant-intervenors' suggestion that they lack standing, plaintiffs must demonstrate that they have suffered "injury in fact," that is, injury **[**12]** "fairly traceable" to the actions of defendants and that the injury will likely be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992); *Navegar, Inc. v. United States*, 322 U.S. App. D.C. 288, 103 F.3d 994, 997-98 (D.C. Cir. 1997). Plaintiffs have provided evidence that the listing of the fairy shrimp has depressed their land values and development prospects, has halted or impeded specific developments, and has already cost them thousands of dollars for sampling surveys as well as the costs of delay. *See Declaration of Robert Shattuck*, PP 5, 7 (Jan. 27, 1996); Declaration of Larry D. Kelley PP 3-12 (Jan. 27, 1996); Declaration of Randy Schaber PP 5-9 (Jan. 26, 1996); Affidavit of Robert Ryan PP 4-6 (Dec. 15, 1995); Declaration of Lorraine Garcy PP 4-12 (Jan. 11, 1996), Pls.' Opposition to Defs.' Motions for Summary Judgment, Exs. A-E.

Defendant-intervenors argue that plaintiffs' injuries are not "fairly traceable" to the listing decision but rather that their injuries will be caused in the future, if at all, by yet-to-be-published regulations promulgated pursuant to the listing. The Supreme Court **[**13]** has recently made clear, however, that the "fairly traceable" requirement does not mean that plaintiffs must show that the listing was "the very last step in the chain of causation." *Bennett v. Spear*, 137 L. Ed. 2d 281, 117 S. Ct. 1154, 1164 (1997). Rather, plaintiffs can meet their burden by demonstrating that the listing had a "determinative or coercive effect on the action of someone else" who, in turn, caused plaintiffs injury. *Id.* In this case, the listing has already had significant effects on the Army Corps of Engineers and the various regulatory entities that govern land use in California, which in turn, as the affidavits and declarations demonstrate,

have forced plaintiffs to incur costs and delays. Plaintiffs therefore have standing under Article III to challenge the listing.

B. Prudential Standing

Under the APA and some parts of the ESA, a plaintiff must meet both Article III standing requirements and prudential standing requirements. Prudential standing is a "judicially self-imposed limit[] on the exercise of federal jurisdiction," *Bennett v. Spear*, 117 S. Ct. at 1161, and it "applies unless it is expressly negated." *Id.* at 1162 (holding that the **[**14]** citizen-suit provision of the ESA, which permits suits by "any person," expands the zone-of-interests for certain claims); *see State of Idaho v. ICC*, 308 U.S. App. D.C. 268, 35 F.3d 585, 592 (D.C. Cir. 1994). One of the requirements of prudential standing is "that a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit." *Bennett v. Spear*, 117 S. Ct. at 1161 (citing *Allen v. Wright*, 468 U.S. 737, 751, 82 L. Ed. 2d 556, 104 S. Ct. 3315 (1984)).

Plaintiffs argue that the Supreme Court's recent decision in *Bennett v. Spear* removes any doubt as to their prudential standing. The Court agrees. In *Bennett v. Spear*, the Supreme Court held that irrigation districts that used water from the Klamath Irrigation Project had prudential standing both under the ESA and the APA **[*900]** to challenge a Biological Opinion issued by the FWS that arguably would have reduced the amount of water available for plaintiffs' use. The Court reversed the Ninth Circuit's decision that the plaintiffs lacked standing because their admittedly economic interests did not fall within the zone of **[**15]** preservationist and environmental interests protected by the ESA.

The Court first held that the citizen-suit provision of the ESA, which authorizes suit by "any person," negates the zone-of-interests test altogether because it manifests a clear

congressional intent to permit anyone to sue, no matter the nature of their interest. *Bennett v. Spear*, 117 S. Ct. at 1162. In other words, an affected interested business that thinks that the FWS has gone too far in seeking to protect and preserve the environment may be a "person" under the ESA on equal footing with a preservationist or environmentalist who challenges an FWS decision not to preserve or conserve the environment sufficiently.

The Court also recognized in *Bennett v. Spear*, however, that not all suits can be brought under the citizen-suit provision of the ESA; suits (such as the instant action) to compel the Secretary to perform his statutory responsibilities under the ESA, for example, are cognizable only under the APA. *Bennett v. Spear*, 117 S. Ct. at 1167. The Court held that such APA plaintiffs are indeed subject to the zone-of-interests test but that the Bennett plaintiffs met the test even though their **[**16]** interests were economic and not environmental. As a general rule, the Court held that

> whether a plaintiff's interest is "arguably . . . protected . . . by the statute" within the meaning of the zone-of-interests test is to be determined not by reference to the overall purpose of the Act in question (here, species preservation), but by reference to the particular provision of law upon which the plaintiff relies.

Id. at 1167. In other words, a plaintiff's interests need not track the overarching preservationist and environmentally protective purpose of the ESA itself but need only comport with the more specific particular provision of the ESA being invoked.

The Bennett plaintiffs complained that the FWS had not used the best available science as required under 16 U.S.C. § 1536(a)(2). The Court reasoned that the "best scientific and commercial data" provision of the ESA was intended, at least

in part, "to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives," and that plaintiffs' economic interests fell within that zone even though their interests did not follow the general preservationist **[**17]** thrust of the ESA itself. *Bennett v. Spear*, 117 S. Ct. at 1168. Like the plaintiffs in *Bennett v. Spear*, plaintiffs here have prudential standing to challenge the agency's use of the best scientific and commercial data in listing the fairy shrimp.[6]

Even before *Bennett v. Spear*, the D.C. Circuit recognized that a party can meet the prudential standing test by qualifying either as a regulated interest or a protected interest. *Hazardous Waste Treatment Council v. Thomas*, 280 U.S. App. D.C. 296, 885 F.2d 918, 922 (D.C. Cir. 1989) ("HWTC"). The court reasoned that those who are regulated "have the incentive to guard against any administrative attempt to impose a greater burden than that contemplated by Congress," just as environmental **[**18]** groups may serve as watchdogs to assure that the agency fulfills its responsibilities under the law. 885 F.2d at 922. The party, however, must be "regulated by the particular regulatory action being challenged." *Id.* As the Supreme Court has explained:

> In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiffs' interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. The test is not meant to be especially demanding.

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[6] In view of this conclusion, the Court does not reach the question of whether plaintiffs' claims might have been brought under the citizen-suit provision, in which case the zone-of- interests test would not apply to them at all. *Bennett v. Spear*, 117 S. Ct. at 1162.

Clarke v. Securities Industry Assoc., 479 U.S. 388, 399, 93 L. Ed. 2d 757, 107 S. Ct. 750 (1987).

[*901] Defendant-intervenors argue that plaintiffs are not regulated by the listing itself but only will be regulated by its eventual enforcement. They also contend that Congress contemplated imposing on landowners precisely the sort of economic burden complained of by plaintiffs when it passed the ESA because it explicitly decided that listing decisions are not to be made on economic bases. Under this theory, defendant-intervenors maintain, plaintiffs are not **[**19]** challenging an administrative attempt to impose a "greater burden" than that contemplated by Congress, as required by the test laid out in HWTC, because the burden of the listing is no "greater" than Congress intended it to be.

The Court is not persuaded by this argument. As soon as the fairy shrimp were listed, it became a violation of the ESA to significantly modify fairy shrimp habitat. Section 9 of the ESA makes it unlawful for any person to "take any such [listed endangered] species within the United States or the territorial sea of the United States." 16 U.S.C. 1538(a)(1)(B). Under the ESA the term "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). The term "harm" as used in the ESA's definition of "take" includes significant habitat modification or degradation where it actually kills or injures wildlife. *Babbitt v. Sweet Home Chapter of Communities for Greater Oregon*, 515 U.S. 687, 115 S. Ct. 2407, 2418, 132 L. Ed. 2d 597 (1995). Since plaintiffs are landowners who already have modified, or are in the process of modifying or are about **[**20]** to modify the fairy shrimp's habitat, they are directly regulated by the

listing of the fairy shrimp and they therefore have prudential standing under the ESA.[7]

V. PROCEDURAL CHALLENGES

Plaintiffs challenge the fairy shrimp listing on a variety of procedural grounds. They assert that the FWS did not give sufficient public notice of and opportunity for comment on either its methodology or on the scientific report, the Simovich Study, on which it primarily relied. Plaintiffs also argue that the Simovich Study does not represent the best available science because it sampled only a **[**21]** 200 mile transect of the Central Valley and did not sample the entire state of California or Oregon. Plaintiffs further assert that the listing should be vacated because it was not promulgated within the ESA's statutory deadline and that the original petitions to list the fairy shrimp were fatally deficient because they contained insufficient information.

A. Notice Under the ESA and the APA

An agency need not provide opportunity for notice and comment on all changes made to a proposed rule. A final rule may deviate from the proposed rule if the final rule is a "logical outgrowth" of the proposed rule. *Solite Corp. v. EPA*, 293 U.S. App. D.C. 117, 952 F.2d 473, 484-85 (D.C. Cir. 1991); *see Omnipoint Corp. v. FCC*, 316 U.S. App. D.C. 259, 78 F.3d 620, 631-32 (D.C. Cir. 1996); *Small Refiner Lead Phase-Down Task Force v. EPA*, 227 U.S. App. D.C. 201, 705 F.2d 506, 546-47 (D.C. Cir. 1983). In determining how much notice is enough,

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[7] The Court also notes that under defendant-intervenors' theory of standing, the plaintiffs in both *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687, 115 S. Ct. 2407, 132 L. Ed. 2d 597 (1995), and *Endangered Species Comm. v. Babbitt*, 852 F. Supp. 32 (D.D.C. 1994), might well have lacked standing. The Court is unwilling to assume that these plaintiffs merely slipped between the judicial cracks.

the Court must decide "how well the notice that the agency gave served the policies underlying the notice requirement." *Small Refinery Lead Phase-Down Task Force v. EPA*, 705 F.2d at 547. The three purposes of notice requirements are to ensure **[**22]** that agency regulations are tested by exposure to diverse public comment, to ensure fairness and an opportunity to be heard, and to enhance judicial review. *Id.* These interests are balanced against the public interest in expedition and finality. *Id.*[8] **[**23]**

[*902] Plaintiffs complain that they were not put on notice that the FWS was going to rely on the concept of "vernal pool complexes" rather than "individual vernal pools" in defining fairy shrimp habitat. The Proposed Rule referred to vernal pool complexes several times in describing the habitat of the fairy shrimp, and the Final Rule concluded that based on "the genetic characteristics of the . . . fairy shrimp, as well as ecological conditions, . . . populations of [fairy shrimp] are defined by pool complexes rather than by individual vernal pools." Final Rule, 59 Fed. Reg. at 48137, 48141. This reliance on complexes effectively reduces the number of fairy shrimp populations, rendering the species more likely to be found to be endangered or threatened, and plaintiffs argue that they were not on notice that this critical determination would be made in this way.

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[8] In *Solite Corp. v. EPA*, the D.C. Circuit upheld a rulemaking in which the EPA relied on data not available for notice and comment in the proposed rule, reasoning that the data was "supplementary," that it "expanded on and confirmed information contained in the proposed rulemaking and addressed alleged deficiencies in the pre-existing data," that the methodology "remained constant and . . . the added data was used to check or confirm prior assessments," and that "critical elements of the proposal did not change." *Solite Corp. v. EPA*, 952 F.2d at 484-85. By contrast, where the methodology of a report was widely disputed, Judge Sporkin held that it was error for the agency not to make the report available for notice and comment. *Endangered Species Comm. v. Babbitt*, 852 F. Supp. at 37.

The Proposed Rule mentioned vernal pool complexes four times (A.R. at 480, 482, 483, 483), and at least one scientist explained that it is standard practice to assess fairy shrimp habitat in terms of complexes. Letter from Dr. Richard Grosberg (May 18, 1993), A.R. at 258. Indeed, the entire thrust of the Proposed Rule focused **[**24]** on the extent of the fairy shrimp vernal pool habitat, and plaintiffs knew or should have known that the method of assessing population was at issue.[9] While the proposed rule may not explicitly have defined how a particular "complex" was measured or determined, plaintiffs certainly had sufficient notice to enable them to challenge the concept itself. The Court finds that plaintiffs were on notice that the FWS would consider vernal pool complexes as a basis for determining fairy shrimp populations. The Court also concludes that the use of this methodology was neither arbitrary nor capricious.[10] **[**25]**

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[9] Plaintiffs also argue that FWS was arbitrary and capricious because it relied on the "vernal pool complex" model to list the fairy shrimp but on an "individual vernal pool" model in declining to list the California linderiella. Defendants respond that with respect to the linderiella, the FWS did not merely count the number of populated pools but determined more fundamentally that the amount of suitable linderiella habitat was greater than for the other species and that the linderiella had a more extensive range, based in large part on the Sugnet Report submitted by plaintiffs' experts. Defs.' Opp'n at 10 n.7.

[10] It bears emphasis that plaintiffs offer no evidence that this methodology is flawed in any way; indeed they concede as much and argue only that they were not properly informed of the methodology beforehand. Pls.' Reply at 2 n.2 ("Superior BIA does not contest FWS's decision that populations of Shrimp are best defined by 'complexes' as opposed to individual pools. We argue, however, that FWS acted arbitrarily by failing to articulate its methodology in applying the 'complex' model.").

Plaintiffs also assert that they were deprived of notice of and the opportunity to comment on the Branchiopod Research Group Study, a key sampling study of fairy shrimp abundance relied on by the FWS in its Final Rule and authored principally by Dr. Marie A. Simovich. Invertebrate Study: 1991-1993: PGT-PG&E Pipeline Expansion Project ("Simovich Study"), A.R. at 2663-2717 (Volume I), 2718-2795 (Volume II), and 3166-3383 (Volume III); *see* 59 Fed. Reg. at 48141. The study sampled a 200-mile north-south transect in the Sacramento Valley and documented the paucity of fairy shrimp in the sampled area. Simovich **[**26]** Study, Volume II at 6-15, Volume III at 159, A.R. at 2723-40, 3830. While the study itself does not appear to contain explicit conclusions about the threatened or endangered status of the fairy shrimp, the three crustacean biologists who conducted the research for the FWS relied on it, as well as on their own professional expertise, in concluding that fairy shrimp are rare throughout their ranges and recommending that they be listed. *See* Letter from Marie A. Simovich (July 2, 1992), A.R. at 573-74; Letter from Marie A. Simovich (Sept. 4, 1992) at 3-4, A.R. at 872-73; Letter from Richard C. Brusca (June 16, 1992), A.R. at 527-30; Letter from Jamie L. King at 3 (Sept. 11, 1992), A.R. at 896. The FWS received the Simovich Study during the initial notice and comment period itself and did not subsequently make it available for public comment.

Because the Final Rule relies heavily, although not exclusively, on the Simovich Study for the important proposition that **[*903]** fairy shrimp are rare within their ranges, 59 Fed. Reg. at 48141, the study should have been made available for notice and comment. Fundamentally, however, the Final Rule does not turn on the Simovich Study results but rests **[**27]** on a broad constellation of data and factors. Furthermore, even the conclusion that fairy shrimp are rare within their ranges has other support in the record. *Cf. Endangered Species Comm. v. Babbitt*, 852 F. Supp. at 37. Indeed, many experts

recommended listing the species without relying on the Simovich Study.[11] The Court concludes that the failure of the FWS to submit the Simovich Study to public notice and comment does not rise to the level of arbitrary and capricious agency action and that its failure to do so therefore does not warrant vacating the Final Rule. *See City of Las Vegas v. Lujan*, 891 F.2d at 935. **[**28]**

The only research identified by plaintiffs that contradicts the Simovich Study is the report prepared by Sugnet & Associates, an environmental consulting firm retained by plaintiffs. *See* Preliminary Compilation of Documented Distribution, Fairy Shrimp and Tadpole Shrimp Proposed for Listing, California 1993 ("Sugnet Report") (Apr. 29, 1993), A.R. at 2849-2888. It is abundantly clear from the record that the FWS gave careful consideration to the Sugnet Report and even relied on some of its data in deciding not to list the linderiella. 59 Fed. Reg. at 48138, 48140-41, 48145-46. *See also* Defendant-Intervenors' Mem. at 32 & n.22. Furthermore, the Sugnet Report, and its finding that fairy shrimp are more abundant than previously believed, is itself controverted. *See* Letter from Dr. Richard Grosberg (May 18, 1993), A.R. at 258-60. The Court concludes that the FWS's listing decision was sufficiently supported by scientific evidence beyond the Simovich Study and that in reaching its decision the FWS was aware of and gave careful consideration to the only opposing view (the Sugnet Report). The FWS engaged in a sufficiently careful evaluation of the evidence to make it inappropriate

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[11] Letters from Dr. Denton Belk (June 27, 1992 and Aug. 24, 1992), A.R. at 560, 644; Letter from Dr. Robert Holland (Sept. 18, 1992), A.R. at 927-32; Letter from Professor Clyde H. Erickson (July 7, 1992), A.R. at 575; Letter from Dr. Joel W. Martin (Sept. 8, 1992), A.R. at 881; Letter from Dr. Alan E. Launer (Sept. 11, 1992), A.R. at 892; Letter from Dr. Richard Grosberg (May 18, 1993), A.R. at 258-60; Memorandum from the Invertebrate Working Group (Aug. 21, 1992), A.R. at 643.

[**29] for this Court to vacate the Final Rule on that basis. *See Marsh v. Oregon Natural Resources Defense Council*, 490 U.S. at 377-78.

Plaintiffs further attack the FWS's reliance on the Simovich Study under the theory that it does not represent the best available science. The ESA requires the Secretary to make listing determinations "solely on the basis of the best scientific and commercial data available . . . ." 16 U.S.C. § 1533(b)(1)(A). Plaintiffs argue that the Simovich study is not the best available science because it only sampled a 200-mile transect of the Central Valley, because the sampling was not "random," and because it relies on the indeterminate concept of vernal pool complexes. As noted, however, the FWS relied on a great deal of scientific and commercial data in addition to the Simovich Study.[12] Most importantly, plaintiffs have pointed to no data that was omitted from consideration by the FWS. While it would have been advisable for the Simovich Study to have been tested in the crucible of public notice and comment, the FWS appears to have assembled and evaluated all the available data on the fairy shrimp of which the Simovich Study was only one element, albeit [**30] an important one. In light of the comprehensive quality of the FWS's data collection, the Court finds that the agency relied on the best available science pursuant to Section 1533(b)(1)(A).

B. The ESA's Statutory Deadline

Plaintiffs argue that the listings should be vacated because they were not promulgated within the ESA's statutory deadline. Not only do they offer no authority for this proposition but recent case law is to the contrary. *See Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392, 1399-1401 (9th Cir. 1995) (Secretary's failure to list species within 18 months after proposal did not bar listing). Plaintiffs reliance on 16 [*904]

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[12] *See supra* n11.

U.S.C. § 1533(b)(6)(B)(ii) is misplaced since this section only applies where the Secretary has found insufficient evidence to list a species.

C. The Original Petitions to List

Plaintiffs challenge as fatally deficient the original petitions to list the fairy shrimp, arguing that they contained insufficient information to support the **[**31]** listing. The plain language of the ESA indicates, however, that the Secretary's finding that a petition is warranted is not subject to judicial review. 16 U.S.C. § 1533(b)(3)(C)(ii) states: "Any negative finding described in subparagraph (A) and any finding described in subparagraph (B)(i) or (iii) shall be subject to judicial review." A finding that a petition is warranted is controlled by subparagraph (B)(ii), the subparagraph expressly left out of the judicial review provision. Moreover, even if this Court had the authority to review the warranted finding, the standard is a generous one: the Secretary need only determine whether the petition includes "substantial information [which is] that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted." 50 C.F.R. § 424.14(b)[13] Plaintiffs' challenge on this basis must fail. **[**32]**

VI. THE SERVICE'S STATUTORY AUTHORITY AND ALLEGED VIOLATION OF ITS OWN POLICIES

A. Listing a Distinct Invertebrate Population

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[13] 50 C.F.R. § 424.14(b) does not, as plaintiffs assert, require that a petitioner include a narrative or any other specific kind of information in the petition but only that the Secretary consider such elements among others.

16 U.S.C. § 1532(16) permits the listing of a distinct population of a vertebrate species but not of an invertebrate species. Plaintiffs argue that because the FWS listed the fairy shrimp, an invertebrate species, based on the analysis of isolated populations, it has in effect listed a distinct population of an invertebrate species and thereby exceeded its statutory authority under the ESA. To put it another way, plaintiffs argue that the FWS's sampling data is inadequate to prove that each of the four fairy shrimp species is actually endangered. This argument essentially recasts plaintiffs' best available scientific evidence argument that defendants have not properly measured the extent, range and scarcity of the fairy shrimp species. *See supra* at 15-17. Again, plaintiffs point to no evidence that the fairy shrimp in the vernal pools studied by the myriad experts relied on by the FWS represent a distinct population of fairy shrimp or that the four listed fairy shrimp species are not valid species. The FWS did not list a distinct invertebrate **[**33]** population, *cf. Carlton v. Babbitt*, 900 F. Supp. 526, 528-29 (D.D.C. 1995), and plaintiffs' challenge on this basis therefore fails.

B. Did the FWS Violate Its Own Policies?

Plaintiffs argue that the FWS violated its own internal policy statements with respect to (1) independent peer review, see Notice of Policy Statement, 59 Fed. Reg. 34270 (July 1, 1994); (2) using primary and original sources, *see* Notice of Policy Statement, 59 Fed. Reg. 34271 (July 1, 1994); and (3) providing notice regarding the kinds of land use activities that might expose plaintiffs to liability, *see* Notice of Policy Statement, 59 Fed. Reg. 34272 (July 1, 1994). Defendants respond that agency policy statements do not create enforceable rights and that in any event these policies were promulgated or went into effect after the notice and comment period and thus are inapplicable.

> The touchstone for enforceability [of an agency rule or statement] is agency intent. . . . The binding quality of a particular rule or statement will depend on whether the agency intended to establish a substantive rule, one which is not merely interpretive but which creates or modifies rights that can **[**34]** be enforced against the agency.

Jackson v. Culinary School of Washington, 307 U.S. App. D.C. 123, 27 F.3d 573, 584 (D.C. Cir. 1994). *See also Vietnam Veterans of America v. Secretary of the Navy*, 269 U.S. App. D.C. 35, 843 F.2d 528, 536-38 (D.C. Cir. 1988). The APA specifically exempts "general statements of policy" from the requirements of notice and comment, 5 U.S.C. § 553(b)(A), although such statements **[*905]** must either be published in the federal register or made available for public inspection and copying. 5 U.S.C. §§ 552(a)(1)(D) and (a)(2)(B).

The stated purpose of the FWS peer review policy is to "clarify the role of peer review" under the ESA; it is "intended to complement and not circumvent or supersede the current public review process." 59 Fed. Reg. at 34270. The policy is not an APA promulgated regulation of the sort held to be enforceable against an agency. *Cf. Mine Reclamation Corp. v. FERC*, 308 U.S. App. D.C. 152, 30 F.3d 1519, 1524 (D.C. Cir. 1994). Rather, the language of the policy resembles the sort of nonbinding policy held unenforceable in *Pacific Gas & Electric Co. v. FPC*, 164 U.S. App. D.C. 371, 506 F.2d 33, 38 (D.C. Cir. 1974). *See* **[**35]** KENNETH CULP DAVIS & RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE § 6.2 at 228-31 (1994 & Supp. 1996). The same is true of the FWS original source policy statement, 59 Fed. Reg. 34271, and the FWS notification policy statement, 59 Fed. Reg. 34272. Both

use language reflecting the agency's intention that they be nonbinding.[14]

Even if these policies were binding on the **[**36]** FWS, at least two of them took effect too late to affect the fairy shrimp listing. The peer review policy became effective July 1, 1994, but it primarily governs the management of public comment periods, which, for the fairy shrimp, closed on September 22, 1992. Similarly, the notification policy applies only to species listed after October 1, 1994. The final fairy shrimp listings occurred on September 19, 1994. The FWS's decision to list the fairy shrimp cannot be overturned based on the FWS's alleged noncompliance with its own, nonbinding policy statements.

VII. FAILURE TO DESIGNATE CRITICAL HABITAT

The ESA instructs that concurrently with listing a species the Secretary of the Interior shall, "to the maximum extent prudent and determinable," designate any habitat of such species "which is then considered to be critical habitat." 16 U.S.C. § 1533(a)(3)(A).[15] The implementing regulations

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[14] Even if the notification policy were binding, it states that "it is the policy of the Service to identify, to the extent known at the time a species is listed, specific activities that will not be considered likely to result in violation of section 9 [of the ESA]. To the extent possible, activities that will be considered likely to result in violation also will be identified in as specific a manner as possible." 59 Fed. Reg. at 34272 (emphasis added). In other words, the FWS policy promises no more than to identify some safe activities, not, as plaintiffs would have it, to delineate the full extent of plaintiffs' potential liability.

[15] The ESA further requires:

> A final regulation designating critical habitat of an endangered species or a threatened species shall be

(continued...)

explain in relevant part that "[a] designation of critical habitat is not prudent when . . . the species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species . . ." 50 C.F.R. § 424.12(a)(1). **[**37]**

In this case, the Secretary explicitly decided that it would **[**38]** not be prudent to designate critical fairy shrimp habitat, citing the fear that "the publication of precise maps and descriptions of critical habitat in the Federal Register would make these species more vulnerable to incidents of vandalism." Final Rule, 59 Fed. Reg. at 48151; *see* Proposed Rule, 57 Fed. Reg. at 19861 (designation of critical habitat "likely would increase the degree of threat from vandalism or other human activities"). Plaintiffs complain that the failure to designate critical habitat violates the ESA and also deprives landowners

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[15] (...continued)
published concurrently with the final regulation implementing the determination that such a species is endangered or threatened, unless the Secretary deems that—

(i) it is essential to the conservation of such species that the regulation implementing such determination be promptly published; or

(ii) critical habitat of such species is not then determinable, in which case the Secretary, with respect to the proposed regulation to designate such habitat, may extend the one-year period specified in subparagraph (A) by not more than one additional year but not later than the close of such additional year the Secretary must publish a final regulation, based on such data as may be available at that time, designating, to the maximum extent prudent, such habitat.

16 U.S.C. § 1533(b)(6)(C).

of the mechanism by which they could bring economic concerns to the Secretary's attention and obtain notice of what kinds of activities may expose them to liability. **[*906]**

In support of the decision of the FWS not to designate critical habitat, defendants point to a number of incidents of destruction of habitat documented in the administrative record. A.R. at 190, 263A, 573-74, 591, 972, 1011, 1011A, 1012; *see also* A.R. at 1124-29. Only one of these incidents, however, expressly refers to vandalism. *See* Memorandum from FWS Sacramento Field Office (July 3, 1991), A.R. at 1012 (describing "selective destruction" of vernal pools). The **[**39]** other cited sources chronicle generic instances of habitat destruction without discussing the motivation behind the destruction. The mere fact of habitat destruction, however, does not in itself militate against designating critical habitat. Indeed, one of the documents cited by the FWS actually supports the opposite conclusion. *See* Letter from Riverside County Planning Department (July 7, 1992), A.R. at 591-92. This letter describes future developments planned for fairy shrimp habitat, indicating that those developments will continue as scheduled unless the fairy shrimp are listed. The FWS has not explained in any way why designating critical habitat would not further protect such habitat already scheduled for development.

The FWS appears to rely on two assumptions, both without any support in the record: first, that owners of critical habitat who learn of the presence of fairy shrimp on their property would increase their developmental pace in direct violation of the ESA, and, second (the other side of the coin perhaps), that so long as critical habitat is not designated such landowners would remain unaware of their potential liability and therefore not develop their property **[**40]** apace. The Court finds this reasoning, if it can be called that, attenuated and unsupported by the record. The defendants' asserted reason—vandalism—is not sufficiently substantiated by the single record reference to intentional vandalism in light of the

strong presumption that critical habitat will be designated concurrently with the listing of a species. *Northern Spotted Owl v. Lujan*, 758 F. Supp. 621, 626 (W.D. Wash. 1991); *cf. Fund for Animals v. Babbitt*, 903 F. Supp. 96, 115-17 (D.D.C. 1995) (upholding Secretary's decision to deny a petition to designate critical habitat). The case therefore shall be remanded to the FWS for the limited purpose of clarifying or reconsidering this portion of the Secretary's decision. On remand, the Secretary must either initiate the process of designating critical habitat or provide adequate record support and reasoned explanation for the determination that such a designation is not prudent. This limited remand should not be interpreted as affecting the validity of the listing itself.[16] **[**41]**

VIII. THE COMMERCE CLAUSE AND THE TENTH AMENDMENT

Plaintiffs and amici argue that the final listing of the fairy shrimp (although not the ESA itself) exceeds the federal commerce clause power and violates the Tenth Amendment because there is no nexus between the fairy shrimp and interstate commerce and because the listing interferes with state and local sovereignty over land use. Specifically, they argue that this listing cannot stand in view of the Supreme Court's recent interpretation of the Commerce Clause in *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995), because the fairy shrimp do not "substantially affect"

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[16] In light of this result, the Court does not reach plaintiffs' argument that the failure to designate critical habitat and the FWS's failure to follow its own policy of apprising landowners of what activities might trigger liability violate plaintiffs' right to due process. Pls.' Reply at 29. The Court notes, however, that since plaintiffs participated fully in the notice and comment process leading to the Final Rule and since they also assert that they have already taken costly steps to comply with the listing and draft guidelines, the argument underlying their due process claims that they have not been properly put on notice is unavailing.

interstate commerce. *See United States v. Olin Corp.*, 927 F. Supp. 1502, 1996 WL 276984 (S.D. Ala. 1996) (interpreting Lopez as invalidating and application of CERCLA requiring the clean-up of a 20-acre solid waste management site because the pollution at that site did not affect interstate commerce).

The Court in *Lopez* struck down the Gun-Free School Zones Act, 18 U.S.C. § 922(q), which made it a federal offense to possess a firearm in a school zone, reasoning that

> Section 922(q) is a criminal statute **[**42]** that by its terms has nothing to do with "commerce" or any sort of economic enterprise, **[*907]** however broadly one might define those terms. Section 922(q) itself is not an essential part of a larger regulation of economic activity, in which the regulatory scheme would be undercut unless the intrastate activity were regulated.

United States v. Lopez, 115 S. Ct. at 1630-31. The Court also invalidated Section 922(q) because it criminalized mere possession and "contained no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." *Id.* at 1631.

In contrast to the statutory provision at issue in Lopez, the ESA directly and expressly regulates the import, export and sale of listed species in interstate commerce. 16 U.S.C. §§ 1538(a)(2)(A), (C), (D).[17] At the time of its passage, "the Endangered Species Act of 1973 represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180, 57 L. Ed. 2d 117, 98 S. Ct.

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[17] Defendants have provided declarations of at least one out-of-state expert who has bought or sold fairy shrimp specimens (before they were listed) and who has traveled to California to study them. *See* Declaration of Denton Belk PP 1, 2, 4, 5 (Jan. 31, 1996),

2279 (1978). The Supreme Court described Congress' extraordinarily broad [**43] intent when passing the ESA:

> The legislative proceedings in 1973 are . . . replete with expressions of concern over the risk that might lie in the loss of any endangered species. Typifying these sentiments is the Report of the House Committee on Merchant Marine and Fisheries [stating]: ". . . . The value of this genetic heritage is, quite literally, incalculable. . . . From the most narrow possible point of view, it is in the best interests of mankind to minimize the losses of genetic variations."

Id. at 177-78 (quoting H.R. Rep. No. 93-412, pp 4-5 (1973)) (emphasis in opinion). It would be hard to imagine a stronger expression of Congress' belief that species preservation substantially affects the national economic interest. [**44]

Several courts have upheld the ESA against similar commerce clause challenges, including one judge of this court. In *National Ass'n. of Home Builders v. Babbitt*, 949 F. Supp. 1 (D.D.C. 1996) (Urbina, J.), the court concluded that notwithstanding *Lopez*, "Congress has the constitutional power to protect wildlife," even where the endangered species at issue, the Delhi Sands Flower-loving Fly, was endemic to California and therefore in some sense was not "interstate" in character. *Id.* at 5-8. Similarly, the Ninth Circuit upheld the Eagle Protection Act, 16 U.S.C. § 668, against a commerce clause challenge, reasoning that "extinction of the eagle would substantially affect interstate commerce by foreclosing any possibility of several types of commercial activity." *United States v. Bramble*, 103 F.3d 1475, 1481 (9th Cir. 1996).

The Ninth Circuit in Bramble also reaffirmed the reasoning of the pre-*Lopez* decision in *Palila v. Hawaii Department of Land and Natural Resources*, 471 F. Supp. 985,

994-95 (D. Hawaii 1979), *aff'd* 639 F.2d 495 (9th Cir. 1981). *See United States v. Bramble*, 103 F.3d at 1481 (quoting *Palila* with approval). In *Palila*, the court **[**45]** held that the listing under the Endangered Species Act of the Palila, a bird endemic only to Hawaii, did not exceed Congress' Commerce Clause power or violate the Tenth Amendment. The court noted that "Congress has determined that protection of endangered species anywhere is of the utmost importance to mankind . . . [and that] a national program to protect and improve the natural habitats of endangered species preserves the possibilities of interstate commerce in these species and of interstate movement of persons . . . who come to a state to observe and study these species." 471 F. Supp. at 994-95. *See also Hoffman Homes, Inc. v. EPA*, 999 F.2d 256, 261 (7th Cir. 1993) (acknowledging that Congress could, under its commerce clause power, regulate wetlands that might have an impact on migratory birds). For the same reasons, the application of the ESA to the fairy shrimp is within Congress' commerce clause power.

Plaintiffs' position is untenable for two additional reasons. First, plaintiffs would have the Court invalidate the listing as an impermissible **[*908]** exercise of congressional power because it regulates only intrastate activity. Plaintiffs assume for the purpose of this argument **[**46]** that the fairy shrimp exist only in California and therefore that their preservation (or extinction) does not implicate Congress's interstate powers. Plaintiffs' challenge to the rationality of the listing itself under the APA, however, rests heavily on the assertion that fairy shrimp are more widely found than the FWS admits, and in particular, that their habitat stretches from Oregon to Mexico. *See* Pls.' Mem. in Support of Motion at 33 & n.22. In effect, plaintiffs concede that the actual extent of the fairy shrimp habitat may be less than certain. While plaintiffs are, of course, entitled to argue in the alternative, such factual uncertainty provides a shaky foundation for a constitutional challenge to a heartland application of the Endangered Species Act.

Second, although plaintiffs purport to levy merely an as-applied challenge to the ESA, their argument, if accepted, would undermine the Act's central across the board. According to plaintiffs, if a species is abundant and scattered plentifully across state lines, Congress is fully empowered under the Commerce Clause to protect it. But when that same species becomes more scarce and its population reduced to a single state, [**47] Congress's hands are suddenly tied. The court declines to read *Lopez* as hamstringing Congress in such an irrational fashion in a regulatory area of such important economic, scientific and environmental dimensions.

An Order consistent with this Opinion shall be entered this same day.

SO ORDERED.

PAUL L. FRIEDMAN

United States District Judge

DATE: 7/25/97

ORDER AND JUDGMENT

This case is before the Court on plaintiffs' motion for summary judgment, defendants' motion for summary judgment and defendant-intervenors' motion for summary judgment. Having carefully considered the filings of all the parties as well as amici, the arguments of counsel and the entire record in this case, and for the reasons stated in the accompanying Opinion issued this same day, it is hereby

ORDERED that plaintiffs' motion for summary judgment is GRANTED in part and DENIED in part. The Court finds defendants' decision not to designate critical habitat for the fairy shrimp to be arbitrary and capricious and not supported by the administrative record. Accordingly, that portion of the Secretary's decision is REMANDED to the Fish and Wildlife Service. The FWS shall file a Report with the Court [**48] on

or before September 25, 1997, in which it shall either inform the Court that critical habitat has or will be designated, provide record support for the determination that the designation of critical habitat is not prudent, or provide the Court with a date certain by which one of these alternatives shall be accomplished. All other aspects of the secretary's decision are upheld; it is

FURTHER ORDERED that defendants' motion for summary judgment is GRANTED in part and DENIED in part. With respect to all aspects of the Secretary's decision except the decision not to designate critical habitat, JUDGMENT is entered for defendants; and it is

FURTHER ORDERED that defendant-intervenors' motion for summary judgment is GRANTED in part and DENIED in part. With respect to all aspects of the Secretary's decision except the decision not to designate critical, habitat, JUDGMENT is entered for defendant-intervenors.

SO ORDERED.

PAUL L. FRIEDMAN

United States District Judge

DATE: 7/25/97

Appendix D–1

5 USCS § 553 (2001)

§ 553. Rule making

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include-

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

5 USCS § 706 (2001)

§ 706. Scope of review

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(D) without observance of procedure required by law;

Appendix E–1

LEXSTAT 16 u.s.c. 1533

UNITED STATES CODE SERVICE

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*** CURRENT THROUGH P.L. 107-36, APPROVED 8/20/01 ***

TITLE 16. CONSERVATION

CHAPTER 35. ENDANGERED SPECIES

16 USCS § 1533 (2001)

§ 1533. Determination of endangered species and threatened species

(a) Generally.

(1) The Secretary shall by regulation promulgated in accordance with subsection (b) determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) the present or threatened destruction, modification, or curtailment of its habitat or range;

(B) overutilization for commercial, recreational, scientific, or educational purposes;

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms; or

(E) other natural or manmade factors affecting its continued existence.

(2) With respect to any species over which program responsibilities have been vested in the Secretary of Commerce

pursuant to Reorganization Plan Numbered 4 of 1970 [*5 USCS § 903* note]--

(A) in any case in which the Secretary of Commerce determines that such species should--

(i) be listed as an endangered species or a threatened species, or

(ii) be changed in status from a threatened species to an endangered species,

he shall so inform the Secretary of the Interior, who shall list such species in accordance with this section;

(B) in any case in which the Secretary of Commerce determines that such species should--

(i) be removed from any list published pursuant to subsection (c) of this section, or

(ii) be changed in status from an endangered species to a threatened species,

he shall recommend such action to the Secretary of the Interior, and the Secretary of the Interior, if he concurs in the recommendation, shall implement such action; and

(C) the Secretary of the Interior may not list or remove from any list any such species, and may not change the status of any such species which are listed, without a prior favorable determination made pursuant to this section by the Secretary of Commerce.

(3) The Secretary, by regulation promulgated in accordance with subsection (b) and to the maximum extent prudent and determinable--

(A) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or

a threatened species, designate any habitat of such species which is then considered to be critical habitat; and

(B) may, from time-to-time thereafter as appropriate, revise such designation.

(b) Basis for determinations.

(1) (A) The Secretary shall make determinations required by subsection (a)(1) solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.

(B) In carrying out this section, the Secretary shall give consideration to species which have been--

(i) designated as requiring protection from unrestricted commerce by any foreign nation, or pursuant to any international agreement; or

(ii) identified as in danger of extinction, or likely to become so within the foreseeable future, by any State agency or by any agency of a foreign nation that is responsible for the conservation of fish or wildlife or plants.

(2) The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data

available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

(3) (A) To the maximum extent practicable, within 90 days after receiving the petition of an interested person under section 553(e) of title 5, United States Code [*5 USCS § 553*(e)], to add a species to, or to remove a species from, either of the lists published under subsection (c), the Secretary shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. If such a petition is found to present such information, the Secretary shall promptly commence a review of the status of the species concerned. The Secretary shall promptly publish each finding made under this subparagraph in the Federal Register.

(B) Within 12 months after receiving a petition that is found under subparagraph (A) to present substantial information indicating that the petitioned action may be warranted, the Secretary shall make one of the following findings:

(i) The petitioned action is not warranted, in which case the Secretary shall promptly publish such finding in the Federal Register.

(ii) The petitioned action is warranted, in which case the Secretary shall promptly publish in the Federal Register a general notice and the complete text of a proposed regulation to implement such action in accordance with paragraph (5).

(iii) The petitioned action is warranted, but that--

(I) the immediate proposal and timely promulgation of a final regulation implementing the petitioned action in accordance with paragraphs (5) and (6) is precluded by pending proposals to determine whether any species is an endangered species or a threatened species, and

(II) expeditious progress is being made to add qualified species to either of the lists published under subsection (c) and to remove from such lists species for which the protections of the Act are no longer necessary,

in which case the Secretary shall promptly publish such finding in the Federal Register, together with a description and evaluation of the reasons and data on which the finding is based.

(C) (i) A petition with respect to which a finding is made under subparagraph (B)(iii) shall be treated as a petition that is resubmitted to the Secretary under subparagraph (A) on the date of such finding and that presents substantial scientific or commercial information that the petitioned action may be warranted.

(ii) Any negative finding described in subparagraph (A) and any finding described in subparagraph (B)(i) or (iii) shall be subject to judicial review.

(iii) The Secretary shall implement a system to monitor effectively the status of all species with respect to which a finding is made under subparagraph (B)(iii) and shall make prompt use of the authority under paragraph 7 to prevent a significant risk to the well being of any such species.

(D) (i) To the maximum extent practicable, within 90 days after receiving the petition of an interested person under section 553(e) of title 5, United States Code [*5 USCS § 553*(e)], to revise a critical habitat designation, the Secretary shall make a finding as to whether the petition presents substantial scientific information indicating that the revision may be warranted. The Secretary shall promptly publish such finding in the Federal Register.

(ii) Within 12 months after receiving a petition that is found under clause (i) to present substantial information indicating that the requested revision may be warranted, the

Secretary shall determine how he intends to proceed with the requested revision, and shall promptly publish notice of such intention in the Federal Register.

(4) Except as provided in paragraphs (5) and (6) of this subsection, the provisions of section 553 of title 5, United States Code [*5 USCS § 553*] (relating to rulemaking procedures), shall apply to any regulation promulgated to carry out the purposes of this Act.

(5) With respect to any regulation proposed by the Secretary to implement a determination, designation, or revision referred to in subsection (a)(1) or (3), the Secretary shall--

(A) not less than 90 days before the effective date of the regulation--

(i) publish a general notice and the complete text of the proposed regulation in the Federal Register, and

(ii) give actual notice of the proposed regulation (including the complete text of the regulation) to the State agency in each State in which the species is believed to occur, and to each county or equivalent jurisdiction in which the species is believed to occur, and invite the comment of such agency, and each such jurisdiction, thereon;

(B) insofar as practical, and in cooperation with the Secretary of State, give notice of the proposed regulation to each foreign nation in which the species is believed to occur or whose citizens harvest the species on the high seas, and invite the comment of such nation thereon;

(C) give notice of the proposed regulation to such professional scientific organizations as he deems appropriate;

(D) publish a summary of the proposed regulation in a newspaper of general circulation in each area of the United States in which the species is believed to occur; and

(E) promptly hold one public hearing on the proposed regulation if any person files a request for such a hearing within 45 days after the date of publication of general notice.

(6) (A) Within the one-year period beginning on the date on which general notice is published in accordance with paragraph (5)(A)(i) regarding a proposed regulation, the Secretary shall publish in the Federal Register--

(i) if a determination as to whether a species is an endangered species or a threatened species, or a revision of critical habitat, is involved, either--

(I) a final regulation to implement such determination,

(II) a final regulation to implement such revision or a finding that such revision should not be made,

(III) notice that such one-year period is being extended under subparagraph (B)(i), or

(IV) notice that the proposed regulation is being withdrawn under subparagraph (B)(ii), together with the finding on which such withdrawal is based; or

(ii) subject to subparagraph (C), if a designation of critical habitat is involved, either--

(I) a final regulation to implement such designation, or

(II) notice that such one-year period is being extended under such subparagraph.

(B) (i) If the Secretary finds with respect to a proposed regulation referred to in subparagraph (A)(i) that there is substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination or revision concerned, the Secretary may extend the one-year period

specified in subparagraph (A) for not more than six months for purposes of soliciting additional data.

(ii) If a proposed regulation referred to in subparagraph (A)(i) is not promulgated as a final regulation within such one-year period (or longer period if extension under clause (i) applies) because the Secretary finds that there is not sufficient evidence to justify the action proposed by the regulation, the Secretary shall immediately withdraw the regulation. The finding on which a withdrawal is based shall be subject to judicial review. The Secretary may not propose a regulation that has previously been withdrawn under this clause unless he determines that sufficient new information is available to warrant such proposal.

(iii) If the one-year period specified in subparagraph (A) is extended under clause (i) with respect to a proposed regulation, then before the close of such extended period the Secretary shall publish in the Federal Register either a final regulation to implement the determination or revision concerned, a finding that the revision should not be made, or a notice of withdrawal of the regulation under clause (ii), together with the finding on which the withdrawal is based.

(C) A final regulation designating critical habitat of an endangered species or a threatened species shall be published concurrently with the final regulation implementing the determination that such species is endangered or threatened, unless the Secretary deems that--

(i) it is essential to the conservation of such species that the regulation implementing such determination be promptly published; or

(ii) critical habitat of such species is not then determinable, in which case the Secretary, with respect to the proposed regulation to designate such habitat, may extend the one-year period specified in subparagraph (A) by not more than

one additional year, but not later than the close of such additional year the Secretary must publish a final regulation, based on such data as may be available at that time, designating, to the maximum extent prudent, such habitat.

(7) Neither paragraph (4), (5), or (6) of this subsection nor section 553 of title 5, United States Code [*5 USCS § 553*], shall apply to any regulation issued by the Secretary in regard to any emergency posing a significant risk to the well-being of any species of fish or wildlife or plants, but only if--

(A) at the time of publication of the regulation in the Federal Register the Secretary publishes therein detailed reasons why such regulation is necessary; and

(B) in the case such regulation applies to resident species of fish or wildlife, or plants, the Secretary gives actual notice of such regulation to the State agency in each State in which such species is believed to occur.

Such regulation shall, at the discretion of the Secretary, take effect immediately upon the publication of the regulation in the Federal Register. Any regulation promulgated under the authority of this paragraph shall cease to have force and effect at the close of the 240-day period following the date of publication unless, during such 240-day period, the rulemaking procedures which would apply to such regulation without regard to this paragraph are complied with. If at any time after issuing an emergency regulation the Secretary determines, on the basis of the best appropriate data available to him, that substantial evidence does not exist to warrant such regulation, he shall withdraw it.

(8) The publication in the Federal Register of any proposed or final regulation which is necessary or appropriate to carry out the purposes of this Act shall include a summary by the Secretary of the data on which such regulation is based and shall show the relationship of such data to such regulation; and

if such regulation designates or revises critical habitat, such summary shall, to the maximum extent practicable, also include a brief description and evaluation of those activities (whether public or private) which, in the opinion of the Secretary, if undertaken may adversely modify such habitat, or may be affected by such designation.

(c) Lists.

(1) The Secretary of the Interior shall publish in the Federal Register a list of all species determined by him or the Secretary of Commerce to be endangered species and a list of all species determined by him or the Secretary of Commerce to be threatened species. Each list shall refer to the species contained therein by scientific and common name or names, if any, specify with respect to each such species over what portion of its range it is endangered or threatened, and specify any critical habitat within such range. The Secretary shall from time to time revise each list published under the authority of this subsection to reflect recent determinations, designations, and revisions made in accordance with subsections (a) and (b).

(2) The Secretary shall--

(A) conduct, at least once every five years, a review of all species included in a list which is published pursuant to paragraph (1) and which is in effect at the time of such review; and

(B) determine on the basis of such review whether any such species should--

(i) be removed from such list;

(ii) be changed in status from an endangered species to a threatened species; or

(iii) be changed in status from a threatened species to an endangered species.

Each determination under subparagraph (B) shall be made in accordance with the provisions of subsections (a) and (b).

(d) Protective regulations. Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1) [*16 USCS § 1538*(a)(1)], in the case of fish or wildlife, or section 9(a)(2) [*16 USCS § 1538*(a)(2)], in the case of plants, with respect to endangered species; except that with respect to the taking of resident species of fish or wildlife, such regulations shall apply in any State which has entered into a cooperative agreement pursuant to section 6(c) of this Act [*16 USCS § 1535*(c)] only to the extent that such regulations have also been adopted by such State.

(e) Similarity of appearance cases. The Secretary may, by regulation of commerce or taking, and to the extent he deems advisable, treat any species as an endangered species or threatened species even though it is not listed pursuant to section 4 of this Act [this section] if he finds that--

(A) such species so closely resembles in appearance, at the point in question, a species which has been listed pursuant to such section that enforcement personnel would have substantial difficulty in attempting to differentiate between the listed and unlisted species;

(B) the effect of this substantial difficulty is an additional threat to an endangered or threatened species; and

(C) such treatment of an unlisted species will substantially facilitate the enforcement and further the policy of this Act.

(f) Recovery plans.

(1) The Secretary shall develop and implement plans (hereinafter in this subsection referred to as "recovery plans") for the conservation and survival of endangered species and threatened species listed pursuant to this section, unless he finds that such a plan will not promote the conservation of the species. The Secretary, in developing and implementing recovery plans, shall, to the maximum extent practicable--

(A) give priority to those endangered species or threatened species, without regard to taxonomic classification, that are most likely to benefit from such plans, particularly those species that are, or may be, in conflict with construction or other development projects or other forms of economic activity;

(B) incorporate in each plan--

(i) a description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species;

(ii) objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list; and

(iii) estimates of the time required and the cost to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal.

(2) The Secretary, in developing and implementing recovery plans, may procure the services of appropriate public and private agencies and institutions, and other qualified persons. Recovery teams appointed pursuant to this subsection shall not be subject to the Federal Advisory Committee Act [5 USCS Appx.].

(3) The Secretary shall report every two years to the Committee on Environment and Public Works of the Senate

and the Committee on Merchant Marine and Fisheries of the House of Representatives on the status of efforts to develop and implement recovery plans for all species listed pursuant to this section and on the status of all species for which such plans have been developed.

(4) The Secretary shall, prior to final approval of a new or revised recovery plan, provide public notice and an opportunity for public review and comment on such plan. The Secretary shall consider all information presented during the public comment period prior to approval of the plan.

(5) Each Federal agency shall, prior to implementation of a new or revised recovery plan, consider all information presented during the public comment period under paragraph (4).

(g) Monitoring.

(1) The Secretary shall implement a system in cooperation with the States to monitor effectively for not less than five years the status of all species which have recovered to the point at which the measures provided pursuant to this Act are no longer necessary and which, in accordance with the provisions of this section, have been removed from either of the lists published under subsection (c).

(2) The Secretary shall make prompt use of the authority under paragraph 7 of subsection (b) of this section to prevent a significant risk to the well being of any such recovered species.

(h) Agency guidelines; publication in Federal Register; scope; proposals and amendments: notice and opportunity for comments. The Secretary shall establish, and publish in the Federal Register, agency guidelines to insure that the purposes of this section are achieved efficiently and effectively. Such guidelines shall include, but are not limited to--

(1) procedures for recording the receipt and the disposition of petitions submitted under subsection (b)(3) of this section;

(2) criteria for making the findings required under such subsection with respect to petitions;

(3) a ranking system to assist in the identification of species that should receive priority review under subsection (a)(1) of this section: and

(4) a system for developing and implementing, on a priority basis, recovery plans under subsection (f) of this section.

The Secretary shall provide to the public notice of, and opportunity to submit written comments on, any guideline (including any amendment thereto) proposed to be established under this subsection.

(i) Submission to State agency of justification for regulations inconsistent with State agency's comments or petition. If, in the case of any regulation proposed by the Secretary under the authority of this section, a State agency to which notice thereof was given in accordance with subsection (b)(5)(A)(ii) files comments disagreeing with all or part of the proposed regulation, and the Secretary issues a final regulation which is in conflict with such comments, or if the Secretary fails to adopt a regulation pursuant to an action petitioned by a State agency under subsection (b)(3), the Secretary shall submit to the State agency a written justification for his failure to adopt regulations consistent with the agency's comments or petition.

Supreme Court, U.S.
FILED
DEC 18 2001
CLERK

(2)

No. 01-620

IN THE
Supreme Court of the United States

BUILDING INDUSTRY ASSOCIATION OF SUPERIOR CALIFORNIA, ET. AL.,
Petitioners,

v.

GALE NORTON, ET. AL.,
Respondents,

ENVIRONMENTAL DEFENSE CENTER, ET. AL.,
Respondents.

On Petition for Writ of Certiorari to United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE CONSULTING ENGINEERS AND LAND SURVEYORS OF CALIFORNIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

DAVID M. IVESTER*
JANELLE E. KELLMAN
STOEL RIVES LLP
111Sutter Street, Suite 700
San Francisco, California 94104
(415) 617-8900

*Counsel of Record
December 13, 2001

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INTEREST OF AMICUS CURIAE[1]

The Consulting Engineers and Land Surveyors of California ("CELSOC") represents 1,100 member firms providing a wide variety of services for proposed public works and privately sponsored projects. Services provided by CELSOC's member firms include conducting environmental studies, preparing environmental impact reports, designing site plans for proposed projects, surveying proposed project sites, identifying available water sources, performing water quality analyses, designing drainage for project sites, and assisting project sponsors during the environmental review and permitting process. As environmental issues regarding projects and associated administrative processes are central to the daily operations of its members, CELSOC has an obvious interest in the scope of federal regulatory authority in general, and federal environmental regulation in particular.

Application of the federal Endangered Species Act ("ESA") in California with respect to entirely intrastate activities in violation of the Commerce Clause, burdens or blocks projects for which CELSOC's members provide or could provide services. Owing to the ESA's administration in this unconstitutional manner, CELSOC's members, and other similarly situated engineers and surveyors, have experienced unexpected and unwarranted terminations of

---

[1] Pursuant to this Court's Rule 37.6, amicus states that no counsel for any party authored this brief in whole or in part, and no person or entity other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for the parties have given written consent to the filing of this amicus brief in letters that have been submitted to the clerk of this Court. *See* Sup. Ct. R. 37.3(a).

projects, reductions in the scope of projects, and lengthy and expensive delays in project development and implementation.

Unconstitutional enforcement of the ESA in California also subjects engineering and surveying firms to overlapping and potentially conflicting federal, state, and local standards concerning the protection of entirely intrastate wildlife. The consequent uncertainty and confusion about how and when to satisfy the requirements of the ESA, the entirely independent California Endangered Species Act, and other state and local laws concerning wildlife, subjects engineering and surveying firms to added costs and liability exposure while working on projects. Because the statute challenged in this case restricts the opportunities for engineering and surveying firms to provide services on projects, and exposes such firms to financial harm, this Court's resolution of the issues presented would be of great significance to CELSOC, its members, and other similarly situated engineering and surveying firms.

Summary Of Argument

The listing of endangered and threatened species is of critical importance to those who use or develop property, or hope to, and those (such as CELSOC's members) who assist in the use and development of property. Once listed, a species automatically receives various forms of protection under the ESA, some of which may severely constrain activities and projects on private as well as public land. Roughly half of the species listed by the Service as endangered or threatened are found entirely within a single state, as are the fairy shrimp at issue here.

This Court has never upheld a Commerce Clause regulation of an intrastate activity that is not economic in nature, such as the "taking" of a local species. *United States v. Morrison*, 529 U.S. 598, 611 (2000). To the contrary, the Court has invalidated such regulation in the form of a law authorizing civil damages for gender-motivated crimes (*id.*) and a law prohibiting the possession of a gun within 1,000 feet of a school (*United States v. Lopez*, 514 U.S. 549 (1995)).

Approval, by the Court of Appeals for the District of Columbia Circuit, of the U.S. Fish and Wildlife Service's actions in this case appears to give the federal government authority to regulate nearly any activity, whether commercial or not, on virtually any property. While this result of the case is fairly clear, the rationale is not. The circuit court merely pointed to its earlier 2-1 decision in *National Association of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998), in which individual judges offered several rationales, but failed to agree on any. One thought is that the ESA, by controlling the transport of endangered species, represents a proper exercise of the Commerce Clause power over the "use of the channels of interstate commerce." Another is that loss of medical or economic benefits from a listed species could, in the aggregate, have a substantial effect on interstate commerce, and thus implicate the Commerce Clause power. Yet another is that protection of biodiversity is important to the conservation of our ecosystem on which interstate commerce is dependent.

Because the result below conflicts with the decisions of this Court explaining the limits of the Commerce Clause power, and because the confusion engendered by the diverging rationales offered in *National*

Association of Home Builders calls for coherent resolution of the issue, this Court should take up this important case and clarify the limits of the Commerce Clause power as exercised through the ESA.

At its core, this case also concerns the authority of the federal government to regulate in areas traditionally left to the control of the states. In this respect, it presents the same issue discussed but left unresolved in *Solid Waste Agency v. United States Army Corps of Engineers*, 531 U.S. 159 (2001): Whether the federal power to regulate commerce among the states extends to regulation of species or activities that are entirely intrastate and noneconomic in nature.

Also important and warranting the Court's attention here is the Service's failure to make public, and hear comments on, an important study upon which the Service "placed great weight" in making its decision to list the fairy shrimp. In doing so, the Service stripped Petitioner and other interested parties of the right, under the Administrative Procedure Act ("APA"), to provide complete comments during the rule making process, and deprived itself of important information and analysis. Such action by the agency is entirely inconsistent with the mandate of the APA and unfairly precludes public participation on issues of immense significance.

This Court should accept the petition for certiorari in order to clarify the limits of federal authority under the Commerce Clause, and to articulate the role the public can expect to play in the decision-making process under the APA.

Argument

I. THIS CASE WARRANTS U.S. SUPREME COURT REVIEW TO ADDRESS THE IMPORTANT QUESTION WHETHER APPLICATION OF THE ESA TO INTRASTATE, NONECONOMIC SPECIES AND ACTIVITIES EXCEEDS THE LIMITS OF THE FEDERAL INTERSTATE COMMERCE POWER

A. BEDROCK CONSTITUTIONAL PRINCIPLES ARE AT STAKE HERE

The U.S. Constitution withholds from the federal government an unlimited license to regulate and rather grants the government certain enumerated powers. Unlike the several states, the federal government does not possess a general police power. Federalism and the enumeration of federal powers were principles "adopted by the Framers to ensure the protection of our fundamental liberties." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (citations and internal quotation marks omitted).

In keeping with these principles, the Commerce Clause was carefully crafted to specifically facilitate the development of a common market among the states through the eradication of internal trade barriers. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.)1, 194-95 (1824). "[T]he enumeration of the particular classes of commerce, to which the power was to be extended, would not have been made, had the intention been to extend the power to every description." *Id. quoted in United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000).

The drafters of the U.S. Constitution strove to establish a unified national economy through the elimination of discriminatory regulation by one state

against another, not to strip the states of their power to engage in self-government. Accordingly, the scope of the commerce power must have limits. If the federal power to regulate interstate commerce is to be limited to its stated ends, "the Constitution cannot realistically be interpreted as granting the Federal Government an unlimited license to regulate." *Morrison*, 529 U.S. at 618 n.8. More specifically, it cannot reach matters that are not commerce, or commerce that is not interstate.

This Court has made clear that "[t]he Constitution requires a distinction between what is truly national and what is truly local." *Id.* at 617-18 (citing *United States v. Lopez*, 514 U.S. 549, 568 (1995)). In *Lopez*, this Court noted that judicial deference to congressional regulation of single-state noncommercial activities would result in Congress being able to turn the commerce power into a national police power. *Lopez*, 514 U.S. at 565-67. A government that can regulate virtually anything and everything is not a limited government. Although there are no "bright and clear lines," the extent to which the area of regulation is the province of the states must be considered, as well as the extent to which the regulated activity is connected to commercial concerns. *Id.* at 579 (Kennedy, J., concurring). When the intrusion on state sovereignty is significant, and the purported commercial nexus is not, the statute in question will overstep the bounds of the Commerce Clause. See *Id.* at 564.

Regulation of land use and zoning "is perhaps the quintessential state activity," and has been "traditionally performed by local governments," *FERC v. Mississippi*, 456 U.S. 742, 768 n.30 (1982); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994). *See also Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 402 (1979) ("The regulation of land use is

traditionally a function performed by local governments."). Intrusion on state sovereignty requires a "stronger connection" with commercial concerns central to the Commerce Clause, or the intrusion "contradicts the federal balance the Framers designed." *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring). In the absence of a substantial link to interstate commerce, this intrusion into state land use regulation, and subsequent confusion regarding overlapping regulation, cannot be justified under the limits of the Commerce Clause.

B. THERE IS NO NEXUS BETWEEN THE FAIRY SHRIMP, WHICH ARE THE SUBJECT OF THE GOVERNMENT'S LISTING DECISION, AND INTERSTATE COMMERCE

This case concerns the assertion of jurisdiction, under the Commerce Clause, by the U.S. Fish and Wildlife Service ("USFWS"), which has been charged with administering the ESA. In this role, the USFWS, acting pursuant to the direction of the Secretary of Interior, is granted jurisdiction to determine that a species is endangered or threatened and to designate the critical habitat of such species. 16 U.S.C. § 1533(a)(3) (2000). But that jurisdiction cannot exceed the limits of the Commerce Clause, and, accordingly, it must be shown to concern actual interstate commerce in order to pass constitutional scrutiny.

The USFWS's listing of the fairy shrimp cannot withstand such scrutiny. Upon listing, the fairy shrimp automatically were accorded various protections under the ESA, including protection against unauthorized "taking" by any person. Like the possession of guns in *Lopez*, the "taking" of fairy shrimp has nothing to do with "commerce" or any other economic activity. Indeed, the

possession or taking of fairy shrimp, which are not bought or sold on the open market, has less of a connection to "commerce" than the possession of a gun, an indisputably commercial item. Here, as in *Lopez*, Congress's Commerce Clause authority should not be turned into "a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567.

In rejecting this argument, the district court based its conclusion on Ninth Circuit cases involving the Eagle Protection Act and the Migratory Bird Treaty Act. However, unlike the eagles or migratory birds discussed in those Ninth Circuit decisions, there is little likelihood of interstate commerce in the fairy shrimp or of "'interstate movement of persons . . . who come to a state to study and observe these species.'" *Building Indus. Ass'n of Superior Cal. V. Babbitt*, 979 F. Supp. 893, 907 (D.D.C. 1997) (quoting *Palila v. Haw. Dep't of Land & Natural Res.*, 471 F. Supp. 985, 994-95 (D.Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981)).

As this Court has explained, the proper purview of the Commerce Clause is activity that is economic in nature and that substantially affects interstate commerce. In those cases in which the Court has "sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor." *Morrison*, 529 U.S. at 611. Every law enacted by Congress must be based on a power enumerated in the Constitution. *Id.* at 607. Respondents justify the present statute as an act to regulate interstate commerce. But "[s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Id.* at 614 (quoting *Lopez*, 514 U.S. at 557 n.2) (citation and internal quotation marks omitted). "There is undoubtedly

an internal commerce which is subject to the control of the States." *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 564 (1870). As Chief Justice Marshall observed in *Gibbons*, 22 U.S. (9 Wheat.) at 189, 196, "[c]ommerce . . . is intercourse," and the "power to regulate" means "to prescribe the rule by which commerce is to be governed." In other words, commerce entails the deliberate and purposeful interaction of goods and people in trade, navigation, communication, and movement. *See Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 326 (1851) (Daniel, J., concurring) ("The power delegated to congress by the constitution relates properly to the terms on which commercial engagements may be prosecuted; the character of the articles which they may embrace; the permission or terms according to which they may be introduced[.]").

In distinguishing truly national from truly local activities, the Court is aware that "[s]ome activities may be so private or local in nature that they simply may not be *in* commerce. Nor is it sufficient that the person or activity reached have *some* nexus with interstate commerce." *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 310 (1981) (emphasis in original). The district court dismissed this reasoning, stating instead that "species preservation substantially affects the national economic interest." *Building Indus. Ass'n*, 979 F. Supp. at 907. However, Congress cannot regulate noneconomic activities simply because the activity, when aggregated, may have a substantial effect on commerce. *Morrison*, 529 U.S. at 610-11. The "substantial effects" tests of *Lopez* and *Morrison* forbid the consideration of potential cumulative economic impacts of regulation of noncommercial activity in order to establish authority under the Commerce Clause. To do so would require courts to "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a

general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567.

Since the circuit court did not discuss the merits of Petitioner's Commerce Clause argument, it is uncertain on what basis the circuit court would conclude that the fairy shrimp are linked to interstate commerce. Although the circuit court pointed to the split-panel decision in *National Association of Home Builders*, 130 F.3d 1041, that decision provides no clear rationale for rejecting Petitioner's argument. In *National Association of Home Builders*, Judge Henderson and Judge Wald offered widely different opinions why the ESA was a proper exercise of Congress's Commerce Clause power. Judge Wald stated that the ESA properly controlled the channels of interstate commerce and regulated a class of activities that substantially affects interstate commerce. In contrast, Judge Henderson expressly rejected Judge Wald's arguments, and concluded instead that the loss of biodiversity itself has a substantial effect on the ecosystem and, therefore, on interstate commerce.

Not only does this split-panel decision leave open the question of the limits of the Commerce Clause in the District of Columbia Circuit and how those limits may be discerned, it also conflicts with this Court's decisions in *Lopez* and *Morrison*. Under *Lopez* and *Morrison*, it is the economic nature of the class of regulated activity itself, and not some measurable economic repercussion from the unconstitutional regulation, that must provide the basis for regulation under the Commerce Clause. In the absence of a showing that the fairy shrimp substantially affect interstate commerce, the use of the Commerce Clause to justify the ESA is both unwarranted and unconstitutional.

C. The Listing of the Fairy Shrimp Interferes with State and Local Sovereignty over Land Use Decisions

This case also presents the issue left unresolved in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("SWANCC"): whether the federal power to regulate species or related activities that are entirely intrastate and noneconomic in nature invades the land use regulatory authority of state and local agencies. Although *SWANCC* concerned the use of the Clean Water Act, rather than the ESA, to regulate habitat, the U.S. Army Corps of Engineers' ("Corps") application of a federal regulation to control use and development of land raised many of the same concerns presented here regarding the usurpation of state and local governments' authority over local land use.

In *SWANCC*, the government asserted that because the land at issue served as a habitat for migratory birds, the Corps had the authority to prohibit SWANCC from developing the property as a landfill. Noting that the ponds in question were "seasonal [and] wholly located within two Illinois counties," this Court rejected the Corps' assertion that it could regulate SWANCC's use of its property under the Clean Water Act. *Id.* at 171-72. Noting that the Corps' assertion raised serious constitutional concerns, the Court based its holding on a determination that the language of the Clean Water Act did not provide for the regulation of these isolated ponds, leaving unresolved the question of "whether Congress could exercise such authority consistent with the Commerce Clause." *Id.* at 162.

The issue in this case cannot be resolved under the language of the federal regulation at issue, but instead must involve an examination of Congress's power under the

Commerce Clause. Development of land is an area traditionally reserved for the states by the Tenth Amendment. The Court has also deemed "zoning laws" and land use controls to be "peculiarly within the province of state and local legislative authorities." *Warth v. Seldin*, 422 U.S. 490, 508 n.18 (1975). In fact, the Court has previously noted that "regulation of land use is perhaps the quintessential state activity." *FERC*, 456 U.S. at 767 n.30. States, not federal agencies, are regarded as the proper governing bodies to enact and enforce laws concerning land use planning. *See Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (authority of state and local governments to engage in land use planning has been sustained against constitutional challenge as long ago as decision in *Village of Euclid, Ohio v. Amber Realty Co.*, 272 U.S. 365 (1926)). Here, as in the recent decision in *Jones v. United States*, 529 U.S. 848, 857 (2000), if the Court were to allow the unconstitutional enforcement of the ESA, then "hardly a [parcel of] land would fall outside the federal statute's domain."

The Court should review this case in order to address the constitutional issue left unresolved in *SWANCC*. The federal regulation at issue here intrudes into an area of government traditionally left to state and local control, and places countless building projects under federal jurisdiction without a showing that preservation of the fairy shrimp affects the national economic interest. State and local planning measures run the risk of being undermined by conflicting federal regulations. Consequently, the federal displacement of local control at issue here not only usurps state and local authority, but unnecessarily delays building projects and wastes millions of dollars.

In the proceedings below, Petitioner provided evidence that the listing of the fairy shrimp has depressed land values and development prospects, has halted or impeded specific construction projects, and has cost thousands of dollars in sampling surveys as well as the costs of delay. *Building Indus. Ass'n*, 979 F. Supp. 893. The Commerce Clause does not justify congressional use of "a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." *Maryland v. Wirtz*, 392 U.S. 183, 196 n.27 (1968) (Harlan, J.); *Gibbs v. Babbitt*, 214 F.3d 483, 491 (4th Cir. 2000) ("[W]here a federal statute has only a tenuous connection to commerce and infringes on areas of traditional state concern, the courts should not hesitate to exercise their constitutional obligation to hold that the statute exceeds an enumerated federal power."). By reviewing this case, the Court can resolve these important constitutional concerns in the critical context of the ESA's sweep over local land use regulation.

II. THIS CASE WARRANTS U.S. SUPREME COURT REVIEW TO ADDRESS THE IMPORTANT QUESTION WHETHER THE ADMINISTRATIVE PROCEDURE ACT REQUIRES THE AGENCY TO MAKE AVAILABLE TO THE PUBLIC ALL SCIENTIFIC STUDIES IT RELIES UPON IN MAKING ITS DECISION

In determining whether a species should be listed under the ESA, the USFWS must "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(b)-(c) (2000) (App. D-1) (incorporated into ESA by reference at 16 U.S.C. § 1533(b)(4) (2000) (App. E-6). This requirement ensures that relevant information is brought to the USFWS's attention and that its decision is an informed and intelligent one. In contrast, a scheme that

limits or sidesteps widespread public participation will most likely fail to address all relevant concerns.

Public participation in an agency's rule making process is important for two reasons. First, the combined expertise of the agency and the public produces better rules, since public input leaves the agency better informed and may offset any institutional bias for or against a particular rule. Second, the procedure guarantees an open process by enabling interested parties to express their views to agency officials who are not directly accountable to the voters. In *Guardian Federal Savings & Loan Ass'n v. Federal Savings & Loan Insurance Corp.*, 589 F.2d 658, 662 (D.C. Cir. 1978), the District of Columbia Circuit succinctly set forth the benefits of notice and comment to rule making:

> This public participation assures that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions. Public rule making procedures increase the likelihood of administrative responsiveness to the needs and concerns of those affected. And the procedure for public participation tends to promote acquiescence in the result even when objections remain as to substance.

Here, the USFWS violated the APA by relying on a scientific study obtained after the close of the comment period without giving interested parties an opportunity to comment on the study. More specifically, the USFWS did not give sufficient public notice of, and opportunity for, comment on either its methodology or the scientific report, the Simovich study, on which it primarily relied.

Both courts below acknowledged the critical role that the Simovich study played in the agency's decisionmaking process, yet neither court found that the agency was required, under the APA, to make this important study available for public comment. The district court conceded that "[b]ecause the Final Rule relies heavily, although not exclusively, on the Simovich study for the important proposition that fairy shrimp are rare within their ranges, the study should have been made available for notice and comment." *Building Indust. Ass'n*, 979 F. Supp. 893, 902-03. Similarly, the circuit court observed that the Simovich study was "the best available study." *Building Indust. Ass'n*, 247 F.3d 1241, 1246. The circuit court acknowledged that, under the APA, an agency is obligated to publish for comment the technical studies and data on which it relies, but concluded nonetheless that the USFWS was not required to make the Simovich study available for comment because it "only confirmed the findings delineated in the proposal.". *Building Indust. Ass'n of Superior Cal. v. Babbitt*, 247 F.3d 1241, 1245-46. As the circuit court put it, "a final rule that is a logical outgrowth of the proposal does not require an additional round of notice and comment even if the final rule relies on data submitted during the comment period...In relying on it, the Service 'did no more than provide support for the same decision it had proposed to take.'" *Id.* (*citing Int'l Fabric Inst. v. EPA*, 297 U.S. App. D.C. 331, 972 F. 2d 384, 399 (D.C. Cir. 1992) (per curiam)).

The circuit court's conclusion and reasoning undercuts the APA's publication provision, the whole purpose of which is to allow the public to submit comments both in support of and in opposition to the proposal. Publication also allows the public to suggest alternative solutions to an agency's proposed rule. *See Guardian Federal*, 589 F. 2d at 662. A study that supports the

proposal is as critical an element as the proposal itself, and requires the same opportunity for public discussion and examination. Anything less precludes the public's opportunity to critically examine the proposal or to provide alternatives.

The listing of the fairy shrimp is a highly controversial topic. It makes little sense that the USFWS could rely so heavily on the study, the "best available study," but not allow the public to see it or comment on it. The USFWS's failure to publish the Simovich study, and the lower courts' endorsement of the agency's inaction, strips the public of its right to fully weigh in on a highly contentious decision and violates the public participation provisions of the APA. The clear "purpose of the notice and comment requirement is to provide for meaningful public participation in the rule-making process." *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392, 1404 (9th Cir. 1995). The necessity for notice and opportunity to comment is greatly heightened when an agency relies on a single study to support its final rule. *See id.*

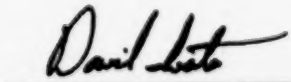
As this Court is well aware, notice and comment procedures are designed to overcome the problems associated with uninformed rule making. Participation by economic and community-based groups "in the rule making process is essential in order to permit administrative agencies to inform themselves and to afford adequate safeguards to private interests." *Report of the Attorney General's Comm'n on Administrative Procedure in Government Agencies* 101-02, 103 (Washington, D.C. 1941). Furthermore, the "[o]pportunity for public comment is particularly crucial when the accuracy of important material in the record is in question." *Idaho Farm Bureau Federation*, 58 F.3d at 1403.

A decision that permits rule making without full public review of the record upon which the rule is promulgated prevents meaningful public participation in the rule making process. Furthermore, such an interpretation allows questionable data to result in the listing of a species as endangered or threatened. The listing of the fairy shrimp has enormous repercussions for homebuilders and those members of the community interested in economic growth. Despite this enormous impact on their livelihood, members of CELSOC and the Building Industry Association, as well as members of the general community, have effectively been prevented by the USFWS's actions from fully weighing in on an important decision, the effects of which will be felt throughout the community. Such a result most surely conflicts with the informed decision making process that the APA is designed to ensure. This case warrants U.S. Supreme Court review to clarify and confirm the open rule making process to be expected of federal agencies.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari in this case.

Respectfully submitted,



David Ivester, Esq.

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SUPREME COURT, U.S.
FILED
DEC 28 2001

No. 01-620

In the Supreme Court of the United States

BUILDING INDUSTRY ASSOCIATION OF SUPERIOR CALIFORNIA, ET AL., PETITIONERS

v.

GALE NORTON, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record
JOHN C. CRUDEN
Acting Assistant Attorney General
ANDREW C. MERGEN
ELIZABETH ANN PETERSON
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

1918

QUESTIONS PRESENTED

1 Whether the decision of the United States Fish and Wildlife Service (FWS) to list four species of fairy shrimp as endangered or threatened, pursuant to Section 4 of the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1533, was a permissible exercise of federal authority under the Commerce Clause.

2. Whether, in deciding whether to list species as threatened or endangered pursuant to the ESA, the FWS may rely on scientific studies received during the comment period for a proposed listing without publishing the new studies for public comment, where the conclusions of those studies confirm the findings on which the agency's listing proposal was based.

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No. 01-620

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v.

GALE NORTON, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B10) is reported at 247 F.3d 1241. The opinion of the district court (Pet. App. C1-C31) is reported at 979 F. Supp. 893.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 2001. A petition for rehearing en banc was denied on July 31, 2001 (Pet. App. A1). The petition for a writ of certiorari was filed on October 11, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Endangered Species Act of 1973 (ESA or Act), 16 U.S.C. 1531 *et seq.*, mandates protection and conservation measures for species of fish and wildlife determined to be endangered or threatened. The Act reflects Congress's recognition that threats to species "may arise from a variety of sources; principally pollution, destruction of habitat and the pressures of trade." H.R. Rep. No. 412, 93d Cong., 1st Sess. 2 (1973) (House Report). The House Report explained that "protection of endangered species is not a matter that can be handled in the absence of coherent national and international policies: the results of a series of unconnected and disorganized policies and programs by various states might well be confusion compounded." *Id.* at 7. Accordingly, while States were given the option of entering into cooperative agreements to administer their own programs for endangered species conservation, see 16 U.S.C. 1535(c)-(e), the Secretaries of the Interior and Commerce were given the primary responsibility for administering the protections of the Act.

Administration of the ESA is divided between the Fish and Wildlife Service (FWS) in the Department of the Interior and the National Marine Fisheries Service (NMFS) in the Department of Commerce, depending on the species in question. See 16 U.S.C. 1532(15); 50 C.F.R. 402.01(b). Under Section 4(a) of the Act, 16 U.S.C. 1533(a), the relevant Secretary determines whether to list a species as "endangered" or "threatened," based on factors that include the "present or threatened destruction, modification, or curtailment of its habitat or range," as well as evidence of "overutilization for commercial, recreational, scientific, or

educational purposes." 16 U.S.C. 1533(a)(1)(A) and (B).[1] Any interested person may petition the appropriate Secretary to add a species to the list of "endangered" or "threatened" species. 16 U.S.C. 1533(b)(3). If the Secretary finds that the petition "presents substantial scientific or commercial information indicating that the petitioned action may be warranted," he "shall promptly commence a review of the status of the species concerned." 16 U.S.C. 1533(b)(3)(A). Listings are made by regulations promulgated pursuant to the rulemaking requirements of the Administrative Procedure Act (APA) and the additional requirements set out in Section 4(b)(5) and (6) of the ESA, 16 U.S.C. 1533(b)(5) and (6).

Section 7(a)(2) of the ESA, 16 U.S.C. 1536(a)(2), requires all federal agencies to "insure" that their actions are "not likely to jeopardize the continued existence of any endangered species or threatened species." Section 9(a)(1) of the Act, 16 U.S.C. 1538(a)(1), prohibits takings of endangered species by all persons who do not have a permit or other authorization. Under the ESA, the term "take" is defined to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. 1532(19); see also 50 C.F.R. 17.3 (definition of "harass"); *Babbitt* v. *Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687 (1995) (upholding regulation defining "harm" for purposes of "take" prohibition).

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[1] An endangered species is one that is in danger of extinction throughout all or a significant portion of its range. 16 U.S.C. 1532(6). A threatened species is one that is likely to become endangered within the foreseeable future throughout all or a significant portion of its range. 16 U.S.C. 1532(20).

2. In November 1990, Ms. Roxanne Bittman petitioned FWS to list the Conservancy fairy shrimp, longhorn fairy shrimp, vernal pool fairy shrimp, and California linderiella as endangered species. Pet. App. C6. In April 1991, Ms. Dee Warenycia petitioned FWS to list the vernal pool tadpole shrimp as an endangered species. *Ibid.* On May 8, 1992, FWS published a proposed rule to list the five species as endangered. *Ibid.*; see *id.* at B2; 57 Fed. Reg. 19,856 (1992). The proposed rule reflected the agency's findings that all five species live only in vernal or seasonal pools and swales and are ecologically dependent on the seasonal characteristics of their habitat. *Id.* at 19,857-19,858. The proposed rule emphasized the adverse impact on the species' habitat of human activities such as urban development, water supply, and flood control activities, which threaten the species' viability by destroying individual vernal pools and through direct and indirect effects on remaining pools resulting from modification of the surrounding uplands. *Id.* at 19,858-19,860. The proposed rule also cited the failure of existing regulatory mechanisms to protect the species as a reason for the proposed listing. *Id.* at 19,860-19,861.

On September 19, 1994, after receiving comments from a variety of sources, FWS published a final rule listing three of the species—the Conservancy fairy shrimp, the longhorn fairy shrimp, and the vernal pool tadpole shrimp—as endangered and the vernal pool fairy shrimp as threatened. 59 Fed. Reg. 48,136 (1994); see Pet. App. B3, C6. The proposal to list the California linderiella was withdrawn. 59 Fed. Reg. at 48,154. The agency "based its determination primarily on the present and threatened destruction, modification and curtailment of the fairy shrimp's habitat and range, the inadequacy of existing regulatory mechanisms, and

other natural and man-made factors." Pet. App. C6-C7; see 59 Fed. Reg. at 48,147-48,150. Among the materials that FWS considered in reaching its decision were two studies of the species proposed for listing that had become available during the public comment period. Those two studies were (1) the "Simovich Study," a long-term, multi-disciplinary study of vernal pool species and habitat by the Branchiopod Research Group, led by Dr. Marie Simovich, and (2) the "Sugnet Study," a compilation of the documented distribution of the five shrimp species proposed for listing, prepared by Sugnet and Associates, a consulting firm retained by members of the building industry. 59 Fed. Reg. at 48,140-48,141; see Pet. App. C17-C18.

3. Petitioners filed suit in the United States District Court for the District of Columbia, challenging the FWS's listing decision. Petitioners contended, *inter alia*, that (a) FWS had violated the notice-and-comment requirements of the APA by failing to provide petitioners an opportunity to comment on the Simovich Study before issuing the final rule, and (b) the listing of the fairy shrimp species exceeded the scope of federal regulatory authority conferred by the Commerce Clause. The district court rejected those contentions. See Pet. App. C17-C19, C26-C30.

4. The Court of Appeals for the District of Columbia Circuit affirmed. Pet. App. B1-B10.

a. The court of appeals held that FWS "was not required to publish the Simovich study for public comment." Pet. App. B7. The court stated that "[t]he APA generally obliges an agency to publish for comment the technical studies and data on which it relies." *Ibid.* The court explained, however, that "to avoid perpetual cycles of new notice and comment periods, a final rule that is a logical outgrowth of the

proposal does not require an additional round of notice and comment even if the final rule relies on data submitted during the comment period." *Id.* at B8 (citation and internal quotation marks omitted). The court concluded that "[s]uch is the case here. * * * Essentially, the [proposed rule] advanced for comment a hypothesis and some supporting data. The Simovich study provided additional support for that hypothesis —indeed, better support than was previously available —but it did not reject or modify the hypothesis such that additional comment was necessary." *Ibid.*

b. Petitioners briefly renewed their argument that the listing at issue exceeds Congress's authority under the Commerce Clause. As the court of appeals observed, however, petitioners' brief stated that the Commerce Clause claim "fail[ed] under *National Assoc. of Home Builders* v. *Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), and is asserted only to preserve the possibility of en banc review." Pet. App. B10 (parallel citation omitted). The court of appeals accordingly did not address the merits of petitioners' Commerce Clause claim.

c. Petitioners' petition for rehearing en banc was denied, upon the absence of a request by any member of the court for a vote. Pet. App. A1.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. a. The courts of appeals have uniformly sustained the constitutionality of the prohibition on takings of listed species established by Section 9 of the ESA, 16 U.S.C. 1538. See *Gibbs* v. *Babbitt*, 214 F.3d 483, 489 (4th Cir. 2000) (upholding restrictions on takings of red

wolves), cert. denied, 121 S. Ct. 1081 (2001); *National Ass'n of Home Builders* v. *Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) (upholding application of ESA Section 9 to the Delhi Sands Flower-Loving Fly), cert. denied, 524 U.S. 937 (1998). See also *United States* v. *Bramble*, 103 F.3d 1475 (9th Cir. 1996) (upholding the constitutionality of the Bald Eagle Protection Act); *Rancho Viejo, LLC* v. *Norton*, No. Civ. A. 1:00CV02798, 2001 WL 1223502 (D.D.C. Aug. 20, 2001) (upholding the constitutionality of ESA Section 9 to private construction project potentially harmful to the arroyo toad); *GDF Realty Invs., Ltd.* v. *Norton*, 169 F. Supp. 2d 648 (W.D. Tex. 2001) (upholding the application of ESA Section 9 to commercial development potentially harmful to invertebrate cave species in Texas); *Palila* v. *Hawaii Dep't of Land & Natural Res.*, 471 F. Supp. 985 (D. Haw. 1979) (upholding the application of ESA Section 9 to Hawaiian bird species), aff'd, 639 F.2d 495 (9th Cir. 1981). Indeed, to our knowledge no court—either before or after this Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995)—has invalidated any federal wildlife legislation as exceeding the reach of Congress's power under the Commerce Clause.[2]

b. Petitioners contend (Pet. 15) that protection of the fairy shrimp species at issue in this case lies beyond the authority of Congress under the Commerce Clause because "the fairy shrimp are a very small, isolated

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[2] In *Babbitt* v. *Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687 (1995), decided during the same Term and shortly after *Lopez*, this Court held that the Secretary of the Interior had reasonably construed the term "harm," as used in the ESA's definition of "take," to include habitat modification that would kill or injure members of a listed species. No Member of the Court suggested that the ESA, so construed, might exceed Congress's power under the Commerce Clause.

species that have no known commercial use." But while FWS, in listing the fairy shrimp species, did not identify evidence of the species' present commercial use, it did explain that commercial activities posed significant current threats to the species' continued existence. See, *e.g.*, 59 Fed. Reg. at 48,147 ("The habitat of these animals is imperiled by a variety of human-caused activities, primarily urban development, water supply/flood control activities, and conversion of land to agricultural use."). Petitioners established their standing to sue in the district court by "provid[ing] evidence that the listing of the fairy shrimp has depressed their land values and development prospects, has halted or impeded specific developments, and has already cost them thousands of dollars for sampling surveys as well as the costs of delay." Pet. App. C9. The ESA's restrictions on private activities that are likely to harm the fairy shrimp species, in general and as applied to petitioners, therefore have a significant commercial nexus.

In any event, petitioners' demand for proof of a particular species' near-term commercial importance ignores two central (and related) premises of the ESA: that individual species are part of an interdependent web, and that the significance of a particular species cannot always be easily determined at a given point in time. Section 9(a)(1)(B) of the ESA regulates takings of all species that have met the strict criteria for listing by FWS or NMFS as endangered or threatened. 16 U.S.C. 1538(a)(1)(B). "In the aggregate, * * * we can be certain that the extinction of species and the attendant decline in biodiversity will have a real and predictable effect on interstate commerce." *National Ass'n of Home Builders*, 130 F.3d at 1053-1054 (opinion of Wald, J.). A focus on the aggregate commercial significance of all listed species is particularly appropriate in light of

(1) the difficulty of identifying *ex ante* the commercial potential of a particular species, and (2) the fact that extirpation of a species eliminates for all time the possibility of future commercial uses.

In resolving questions concerning the proper construction of the ESA, this Court has recognized Congress's concern "about the *unknown* uses that endangered species might have and about the *unforeseeable* place such creatures may have in the chain of life on this planet." *TVA* v. *Hill*, 437 U.S. 153, 178-179 (1978). The Court in *TVA* v. *Hill* relied on the Act's legislative history, which emphasized the "*incalculable*" value of endangered species as "potential resources" and "keys to puzzles which we cannot solve." *Id.* at 178 (quoting House Report 4-5). Precisely because extinction of an endangered species may have irremediable consequences that cannot readily be foreseen, the few remaining members of the species are appropriately regarded as a valuable national resource. As the Fourth Circuit has observed, "[i]t would be perverse indeed if a species nearing extinction were found to be beyond Congress's power to protect while abundant species were subject to full federal regulatory power." *Gibbs*, 214 F.3d at 498; see also Pet. App. C30.

c. Petitioners contend (Pet. 16) that "the listing of the fairy shrimp substantially intrudes on the sovereign power of the State to control local land use—an area of traditional state concern." That claim is without merit.

"Although States have important interests in regulating wildlife and natural resources within their borders, this authority is shared with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers." *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999); see *Missouri* v. *Holland*, 252 U.S. 416

(1920) (sustaining Migratory Bird Treaty Act against challenges that it exceeded Congress's powers to implement a duly ratified treaty and infringed on powers reserved to the States under the Tenth Amendment); *Douglas* v. *Seacoast Prods., Inc.*, 431 U.S. 265, 281-282 (1977) (Congress has power under the Commerce Clause to regulate the taking of fish from state waters, thus preempting conflicting state laws). Thus, unlike the federal statutes struck down by this Court in *Lopez* and in *United States* v. *Morrison*, 529 U.S. 598 (2000), the ESA's take prohibition does not "plow[] thoroughly new ground" or "represent[] a sharp break with the long-standing pattern" of federal regulation. *Lopez*, 514 U.S. at 563 (citation omitted). Rather, "[i]n contrast to gender-motivated violence or guns in school yards, the conservation of scarce natural resources is an appropriate and well-recognized area of federal regulation." *Gibbs*, 214 F.3d at 500; see *id.* at 499-501 (discussing history of federal wildlife conservation efforts).

d. Petitioners contend (Pet. 18-21) that review by this Court is warranted because the two judges in the majority in *National Ass'n of Home Builders*, *supra*, relied on different reasoning in concluding that the regulation at issue in that case was a permissible exercise of federal authority under the Commerce Clause. The existence of such disagreement, however, is neither unusual nor a proper basis for invoking this Court's review. The fact that no single rationale commanded a majority in that case, moreover, does not leave private parties in any doubt as to the nature and extent of their legal obligations. The District of Columbia Circuit was under no obligation to establish a "clearer standard" (Pet. 20) than its ultimate determination that the protection of endangered species found only within a single State is a permissible exer-

cise of congressional power under the Commerce Clause.[3]

e. The "final agency action" that is the subject of petitioners' suit is FWS's decision to list four fairy shrimp species as endangered or threatened. See Pet. 7 ("Petitioners filed this suit challenging the listing of the fairy shrimp on various grounds."); Pet. App. C4 (petitioners "challenge the listing of these four species of fairy shrimp"); *id.* at B2 (petitioners "sought review of the [FWS's] listing of various fairy shrimp species as endangered or threatened"). Petitioners have no colorable argument, however, that the listing decision itself was constitutionally infirm. *Inter alia*, FWS's listing of a species as endangered or threatened triggers the provisions of Section 7(a)(2) of the ESA, 16 U.S.C. 1536(a)(2), which requires all federal agencies to "insure" that their actions are "not likely to jeopardize the continued existence of any endangered species or threatened species." Congress has ample authority to protect endangered or threatened species from the activities of the federal government itself, whatever the scope of its power to pursue the same objectives

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[3] Petitioners state (Pet. 11) that "[n]otwithstanding this Court's recent decision in *United States v. Morrison*, the [court of appeals] did not address Petitioners' Commerce Clause challenge on the merits, but deferred to its own insupportable decision in *National Association of Home Builders*." Petitioners were surely at liberty to argue in the court of appeals that *National Ass'n of Home Builders* had been superseded by *Morrison* and therefore was not binding on the panel. Petitioners expressly disavowed such an argument, however, stating instead that their Commerce Clause challenge was "asserted only to preserve the possibility of en banc review." Pet. App. B10 n.8. The panel therefore cannot be faulted for declining to address the merits of the constitutional claim.

through regulation of private conduct on private land. Because petitioners could not under any plausible constitutional theory be entitled to the relief they seek —vacatur of the FWS's listing decision—the instant case provides an unsuitable vehicle for this Court's consideration of the constitutional issues raised in the petition.

2. Petitioners contend (Pet. 21-30) that FWS violated the APA by considering the Simovich Study in its deliberations without providing the public an opportunity to comment upon that study. Petitioners assert (Pet. 25) that the court of appeals' decision on that issue "directly conflicts" with the Ninth Circuit's ruling in *Idaho Farm Bureau Federation* v. *Babbitt*, 58 F.3d 1392 (1995). That claim lacks merit.

The Ninth Circuit in *Idaho Farm Bureau* did not suggest that an agency must provide a second opportunity for public comment whenever it relies on information that it first receives during or after the initial comment period.[4] To the contrary, the Ninth Circuit, relying on District of Columbia Circuit precedent, acknowledged that "[a]n agency may use supplementary data, unavailable during the notice and comment period, that expands on and confirms information contained in the proposed rulemaking and addresses alleged deficiencies in the pre-existing data, so long as

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[4] Any such rule would be unworkable. If agencies were required to reinitiate notice-and-comment procedures under all such circumstances, "the purpose of notice and comment—to allow an agency to reconsider, and sometimes change, its proposal based on the comments of affected persons—would be undermined. Agencies would either refuse to make changes in response to comments or be forced into perpetual cycles of new notice and comment periods." *Association of Battery Recyclers, Inc.* v. *EPA*, 208 F.3d 1047, 1058 (D.C. Cir. 2000); see Pet. App. B8.

no prejudice is shown." 58 F.3d at 1402 (brackets omitted), quoting *Solite Corp.* v. *EPA*, 952 F.2d 473, 484 (D.C. Cir. 1991) (quoting in turn *Community Nutrition Inst.* v. *Block*, 749 F.2d 50, 57-58 (D.C. Cir. 1984) (Scalia, J.)). The court in *Idaho Farm Bureau* found that a new round of notice and comment was required because, *inter alia*, the new scientific study "provided unique information that was not duplicated in other reports." *Id.* at 1403.

In the instant case, the court of appeals, likewise relying on its prior decision in *Solite Corp.*, articulated a comparable legal standard, stating that "a final rule that is a logical outgrowth of the proposal does not require an additional round of notice and comment even if the final rule relies on data submitted during the comment period." Pet. App. B8. The court concluded that "[s]uch is the case here. The Simovich study, while the best available, only confirmed the findings delineated in the proposal." *Ibid.*; see also *id.* at C17-C18 (district court explains that "the conclusion that fairy shrimp are rare within their ranges has other support in the record," and "many experts recommended listing the species without relying on the Simovich Study"). The divergent outcomes in the two cases therefore turned on the roles that the respective studies played in the agency's decisionmaking processes, not on any difference between the legal standards applied by the Ninth and District of Columbia Circuits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General[*]
JOHN C. CRUDEN
Acting Assistant Attorney General
ANDREW C. MERGEN
ELIZABETH ANN PETERSON
Attorneys

DECEMBER 2001

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[*] The Solicitor General is recused in this case.

(A)

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In the
Supreme Court of the United States

BUILDING INDUSTRY ASSOCIATION
OF SUPERIOR CALIFORNIA, ET AL.,
Petitioners,

v.

GAIL NORTON, ET AL.,
Respondents,

ENVIRONMENTAL DEFENSE CENTER, ET AL.,
Respondents-Intervenors.

On Petition for Writ of Certiorari to United States Court of Appeals for the District of Columbia

REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LAWRENCE R. LIEBESMAN
RAFE PETERSEN
Holland & Knight LLP
2099 Pennsylvania Avenue, N.W., Suite 100
Washington, DC 20006-6801
Telephone: (202) 955-3000
Facsimile: (202) 955-5564

REED HOPPER
Counsel of Record
ROBIN L. RIVETT
Pacific Legal Foundation
10360 Old Placerville Road, Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Petitioners

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ARGUMENT

I

THE LISTING OF THE FAIRY SHRIMP ITSELF IS UNCONSTITUTIONAL

Federal Respondents take the untenable position that the listing of the fairy shrimp itself cannot be unconstitutional under the Commerce Clause[1] because the listing triggers a requirement under Section 7(a)(2), 16 U.S.C. § 1536(a)(2), of the Endangered Species Act (ESA) that all federal agencies must insure that their actions are "not likely to jeopardize the continued existence of any endangered species or threatened species." Brief of the Federal Respondents in Opposition (Fed. Opp.) at 11. Congress has ample authority, they claim, to protect endangered species or threatened species from the "activities of the federal government itself." *Id.* Perhaps so, but a restriction on federal activities is not the only result of the listing.

Federal Respondents conveniently ignore the fact that the listing also results in restrictions on purely private conduct on private land. In addition to Section 7(a)(2), the listing of the fairy shrimp also triggers Section 9(a)(1)(B), 16 U.S.C. § 1538(a)(1)(B), that in Respondents' own words "prohibits takings of endangered species by all persons who do not have a permit or other authorization." *Id.* at 3. This "takings"

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[1] In a similar vein, Respondent Intervenors argue that Petitioners' challenge to the listing decision is not ripe because the listing is analogous to the adoption of a Management Plan in *Ohio Forestry v. Sierra Club*, 523 U.S. 726 (1998), which, according to Intervenors, was a mere programmatic decision that "did not cause significant practical harm to plaintiff's interest." Intervenor Respondent's Opposition at 6. But the analogy is misplaced. The listing of the fairy shrimp does cause significant practical harm to Petitioners' interests. Federal Respondents have acknowledged that Petitioners established their standing to sue in the district court by providing evidence that the listing alone depressed their land values, halted or impeded specific developments, and has cost them thousands of dollars for surveys and delays. *See* Fed. Opp. at 8.

prohibition is part and parcel of the listing and is not limited to "activities of the federal government itself." It applies across the board to all parties and places regulatory burdens even on private conduct that is both intrastate and noneconomic in nature and substantially interferes with local land use regulation, a traditional state function.

The term "take" is defined in the Act to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). By its own terms, the "takings" prohibition has nothing to do with interstate economic activity nor is it limited to federal action. Under this prohibition—automatically triggered by the listing—Petitioners may not engage in otherwise lawful, noneconomic activities that would harm the fairy shrimp. For example, without federal authorization, Petitioners may not rake, hoe, disc, drain, fill, or otherwise modify (or even enter) certain portions of their property, like the seasonal wetlands and puddles in which the fairy shrimp commonly thrive, if it would "take" the listed species. Simply filling a pothole on a dirt driveway in the species' range suddenly becomes a federal concern.

The listing of the fairy shrimp does more than restrict the conduct of federal agencies, it intrudes into the very heart of state functions, usurping local land use and controlling wholly private noncommercial activity. For this reason, the listing of the fairy shrimp itself is unconstitutional. As this Court has stated: "Thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."[2] *United States v. Morrison*, 529 U.S. 598, 613 (2000).

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[2] Except for a new population of vernal pool fairy shrimp discovered in Jackson County, Oregon, cited by Intervenors and reported at 65 Fed. Reg. 18026, 18028 (Apr. 6, 2000), outside the administrative record, the distribution of the other three listed species is limited to the State of California. Moreover, none of the four listed species found in California is known to cross state lines either on its own or as a regular commercial item.

Federal Respondents cannot save the ESA from a constitutional challenge by arguing that some provisions of the Act are within congressional authority while ignoring those provisions that are clearly without congressional authority. The listing of the fairy shrimp alone imposes regulatory burdens on private parties and falls outside the Commerce Clause.

II

THE RULING BELOW CONFLICTS WITH THIS COURT'S COMMERCE CLAUSE DECISIONS IN *LOPEZ* AND *MORRISON*

This case is governed by this Court's precedents in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598. But the court below failed to consider these precedents in upholding the listing of the fairy shrimp. In those cases, this Court established a framework for determining whether an item or activity has "substantial effects" on interstate commerce. To determine "substantial effects" this Court asks: (1) if the regulated object or activity is economic in nature; (2) if the statute has a jurisdictional element establishing through case-by-case analysis a connection to interstate commerce; (3) if the regulation intrudes in areas of traditional state concern; and (4) if the basis for the regulation has any logical stopping point.

In support of the ruling below, Federal Respondents argue only the first and third factors, apparently conceding (as they must) the second and fourth factors—that the ESA has no jurisdictional element establishing through case-by-case analysis a connection to interstate commerce and that the basis for the regulation of fairy shrimp has no logical stopping point, lapses this Court found fatal to the statutes at issue in *Lopez* and *Morrison*.

A. The Ruling Below Cannot Stand Because the Regulated Object or Activity Is Not Economic in Nature

Federal Respondents admit that the object of the listing—the fairy shrimp—is not economic in nature: "FWS, in listing the fairy shrimp species, did not identify evidence of the species' present commercial use . . . ." Fed. Opp. at 8.

However, in support of the ruling below (and *National Association of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), on which the ruling relies), Federal Respondents argue that the statute itself creates the necessary economic connection. For example, they note that Petitioners have established that the listing of the fairy shrimp has "depressed their land values and development prospects, has halted or impeded specific developments, and has already cost them thousands of dollars for sampling surveys as well as costs of delay." Fed. Opp. at 8. Thus, Federal Respondents conclude that the "ESA's restrictions . . . as applied to petitioners, therefore, have a significant commercial nexus." *Id.* But this argument is circular and confuses the result of the regulation with the object of the regulation.

Federal Respondents essentially claim that Congress can create a Commerce Clause connection by passing a statute that imposes economic burdens on private conduct. This turns the law on its head. Under Federal Respondents' argument, Congress could regulate any object or activity that is *not* economic in nature so long as the regulation itself *creates* an economic impact. Thus, a federal law that prohibits one from removing weeds from one's yard would be a legitimate Commerce Clause enactment, according to Federal Respondents, if the law required one to obtain a permit for the weed removal.

This absurd result is the logical extension of Federal Respondents' argument. But Congress may not derive its constitutional authority from its own statutes. Every law enacted by Congress must be based on a power enumerated in the Constitution. *See Morrison*, 529 U.S. at 607. A Commerce Clause enactment, like the ESA, must therefore be based on an existing commercial nexus. The enactment itself cannot create the requisite commercial nexus, as Federal Respondents suggest. In this case, neither the fairy shrimp, nor the listing, nor the "ESA's restrictions" that have resulted in injury to the Petitioners, are economic in nature. The only economic activity Federal Respondents have identified is the cost of compliance. But this is constitutionally deficient. If Congress can bootstrap

Commerce Clause jurisdiction in such a manner, Congress can regulate anything.

B. This Court Has Rejected the Argument Relied on Below That Congress May Regulate Noneconomic Activity Based Solely on That Activity's Aggregate Effect

Undaunted by limitless Commerce Clause authority, Federal Respondents defend the ruling below with the argument advanced in *National Association of Home Builders* that "species are part of an interdependent web" and that the commercial significance of a "species cannot always be determined at a given point in time." Fed. Opp. at 8. Therefore, a "focus on the aggregate commercial significance of all listed species is particularly appropriate" in this case. *Id.* at 8-9. But this approach eviscerates the idea of a federal government of few and defined powers. First, it incorporates a theory that cannot be confirmed or denied—that all species are interdependent—and which could be extended with equal authority to the notion that all things (not just species) are interdependent; then, it reaches into the infinite by relying on speculative economic effects that sometime in the future may be significant if aggregated. If this were the legal standard for exercise of the Commere Clause Power, nothing would be beyond the reach of federal regulation.

Similar arguments were floated by the Federal Government in *Lopez* and *Morrison*, but were summarily dismissed by this Court. Such arguments, this Court stated, are

> substantially weakened by the fact that they rely so heavily on a method of reasoning that we have already rejected [in *Lopez*] as unworkable if we are to maintain the Constitution's enumeration of powers.

Morrison, 529 U.S. at 615.

Thus, in *Morrison* where the Court considered the validity under the Commerce Clause of a federal law that imposed civil penalties for gender-motivated violence , this Court held:

> We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local.

Morrison, 529 U.S. at 617-18.

If harm to people cannot be regulated under the Commerce Clause, how can harm to an obscure, intrastate, noncommercial species like the fairy shrimp be regulated under the Commerce Clause?

C. The Listing of the Fairy Shrimp Upheld in the Court Below Intrudes in Areas of Traditional State Concern

Whether the listing of the fairy shrimp intrudes in areas of traditional state concern has been conceded. As noted above, Federal Respondents have acknowledged that the listing of the fairy shrimp has, among other things, depressed Petitioners' land values and development prospects and halted or impeded specific developments. *See* Fed. Opp. at 8. In other words, the listing of the fairy shrimp has interfered with local land use regulation. This is clearly an area of traditional state concern. Indeed, this Court has held that regulation of land use is the quintessential state activity. *See FERC v. Mississippi*, 456 U.S. 742, 767 n.30 (1982).

But Federal Respondents answer this claim with a diversion. Rather than refute the fact that the listing has interfered with local land use regulation, Federal Respondents change the subject and argue that the federal government may regulate wildlife in concert with the states. *See* Fed. Opp. at 9. This is no answer at all. Whatever power the federal government may have over wildlife, it has chosen to regulate for the benefit of wildlife through the Commerce Clause in a way that substantially interferes with an area of traditional state concern. "Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur

and political responsibility would become illusory." *Lopez*, 514 U.S. at 577. Thus, the decision below directly conflicts with this Court's rulings in *Lopez* and *Morrison* and review should be granted to resolve this conflict.

III

THE COURTS OF APPEAL HAVE NOT SETTLED ON A UNIFORM ANALYSIS OF THE CONSTITUTIONALITY OF THE ESA UNDER THE COMMERCE CLAUSE

The statement by Federal Respondents that "[t]he courts of appeal have uniformly sustained the constitutionality of the prohibition on takings of listed species established by Section 9 of the ESA" is pure hyperbole. A quick review of the cases cited bears this out. In *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000), the court of appeals did uphold prohibitions on the "taking" of the red wolf, but only upon a determination that the "taking" of red wolves, unlike the fairy shrimp in this case, was directly connected to interstate markets such as agricultural products and livestock. *See* 214 F.3d at 495. As for *United States v. Bramble*, 103 F.3d 1475 (9th Cir. 1997), that case involved the Bald Eagle Protection Act, not the ESA. And unlike the ESA, the Bald Eagle Protection Act was directed primarily at commercial activity. *See* 16 U.S.C. § 668(a) (prohibiting the taking, possession, sale, purchase, barter, offering to sell, purchase or barter, transportation, exploration or importation of Bald or Golden Eagles or their parts).

In *National Association of Home Builders*, on which the decision in this case is based, the majority simply could not agree on the proper analysis for upholding Section 9 of the ESA as a valid Commerce Clause enactment. In fact, the majority judges expressly rejected each other's holdings. *See* detailed discussion of this uncertain decision in Petition at 18-21. No other appellate court has ruled on the constitutionality of the ESA, including the Ninth Circuit in *Palila v. Hawaii Department of Land and Natural Resources*, 639 F.2d 495 (9th Cir. 1981), which did not address the issue. Thus, contrary to Federal Respondents' claim that the courts of appeal have uniformly upheld the constitutionality of the ESA under the Commerce Clause, there is no settled Commerce Clause

analysis whatsoever among the federal circuit courts. To give direction to the courts below, therefore, this Court should grant the Petition and address the validity of the ESA under Congress' Commerce Clause authority.

IV

THE RULING BELOW DIRECTLY CONFLICTS WITH THE NINTH CIRCUIT'S RULING IN *IDAHO FARM BUREAU FEDERATION v. BABBITT*

Respondents' claim that there is no conflict between the decision below and *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392 (9th Cir. 1995), is without merit. In that case, the Ninth Circuit employed a notice and comment test entirely different than that applied by the appeals court below. In *Idaho Farm Bureau*, the court weighed a number of factors in determining that a scientific study was subject to public comment under the ESA and the Administrative Procedure Act (APA). Those factors included whether: (1) the study filled data gaps in the proposed rule; (2) the study provided unique data that was not duplicated in other reports; (3) the Fish and Wildlife Service relied largely on the study to support its final rule; and (4) the accuracy of important material in the record is in question. *See id.* at 1403. But in this case, the D.C. Circuit considered none of these factors. Instead, the court mechanically applied a narrow test that undermined the public information purposes of notice and comment. Contrary to the test applied by the Ninth Circuit on virtually identical facts, the test applied below turned only on whether the new study "rejected or modified" the proposed rule. *See* Appendix to Petition at B-8.

Had this case been before the Ninth Circuit, that court would have required a new round of notice and comment on the "Simovich Study." As explained in detail in the Petition, that study was put forward by the Service as the most complete study of California vernal pools ever undertaken. *See* Pet. at 26-29. It did more, therefore, than merely supplement or confirm existing data as the D.C. Circuit held.

The "Simovich Study" met the test established by the Ninth Circuit for invoking public notice and comment under the APA and ESA: (1) the study filled data gaps; (2) the study provided unique information; (3) the Service relied largely on the study to support its final rule; and (4) the accuracy of important material in the record was in question.

As further evidence that *Idaho Farm Bureau* is in direct conflict with the decision in this case, we cite the fact that the scientific study in *Idaho Farm Bureau* did not "reject or modify" the proposed rule any more than the "Simovich Study" did in this case. Thus, whereas in the D.C. Circuit the "Simovich Study," and data like it, need not be made available for public review, in the Ninth Circuit such data will be circulated for public comment. Review should be granted to resolve this conflict.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

DATED: December, 2001.

Respectfully submitted,

LAWRENCE R. LIEBESMAN
RAFE PETERSEN
Holland & Knight LLP
2099 Pennsylvania Avenue,
N.W., Suite 100
Washington, DC 20006-6801
Telephone: (202) 955-3000
Facsimile: (202) 955-5564

REED HOPPER
Counsel of Record
ROBIN L. RIVETT
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Petitioners

MOTION FILED
DEC 1 5 2001

(6)

No. 01-620

In The

Supreme Court of the United States

BUILDING INDUSTRY ASSOCIATION OF SUPERIOR CALIFORNIA, et al.,

Petitioners,

v.

GALE A. NORTON, Secretary of the Interior, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE OF THE STATES OF NEBRASKA, ALABAMA, ALASKA, OHIO, SOUTH CAROLINA, WYOMING AND AMERICAN SAMOA, AND EDWIN MEESE III IN SUPPORT OF PETITIONERS

DON STENBERG
Attorney General
State of Nebraska
2115 State Capitol Building
Lincoln Nebraska 68509-8920
(402) 471-2682

Counsel of Record

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BILL PRYOR
Attorney General
State of Alabama
11 South Union Street
Montgomery, Alabama 36130
(334) 242-7300

BRUCE M. BOTELHO
Attorney General
State of Alaska
P.O. Box 110300
Juneau, Alaska 99801
(907) 465-2133

BETTY D. MONTGOMERY
Attorney General
State of Ohio
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-4320

CHARLES M. CONDON
Attorney General
State of South Carolina
Rembert C. Dennis Building
P.O. Box 11549
Columbia, South Carolina 29211-1549
(803) 734-3970

HOKE MACMILLAN
Attorney General
State of Wyoming
123 State Capitol
Cheyenne, Wyoming 82002
(370) 777-7876

FITI A. SUNIA
Acting Attorney General
American Samoa
P.O. Box 7
Pago Pago, American
Samoa 96799
(684) 633-4163

EDWIN MEESE III
214 Massachusetts Ave.,
N.E.
Washington, D.C. 20002
(202) 546-4400

MOTION FOR LEAVE TO FILE

Amici Curiae move for leave to file the attached brief pursuant to Supreme Court Rule 37(2)(b). The brief is presented on behalf of the states of Nebraska, Wyoming, Ohio, South Carolina, Alaska, Alabama, and the territory of American Samoa, submitted by the States' Attorneys General, who are counsel on the brief. If these Amici alone filed the present brief, no consent for filing would be required under Supreme Court Rule 37(4).

The brief is also presented by Edwin Meese III, in his individual capacity. Mr. Meese served as the 75th Attorney General of the United States. He is a distinguished fellow and holder of the Ronald Reagan Chair in Public Policy at the Heritage Foundation; a member of the Board of Regents of the National College of District Attorneys; distinguished senior fellow, Institute for United States Studies, University of London; and a member of the boards of directors of both the Capital Research Center and Landmark Legal Foundation. Mr. Meese headed an American Bar Association panel which conducted a two-year review of the explosive growth of federal criminal law, and his current research focus includes criminal justice and federalism issues. In his various professional capacities, Mr. Meese is responsible for researching, lecturing, and advising others on criminal justice and federalism issues.

Consent to the filing of this brief has been obtained from both the Petitioners and Respondent in this case, as evidenced by the enclosed letters signed by Theodore B. Olson, Solicitor General, United States Department of Justice, and M. Reed Hopper, Pacific Legal Foundation.

Amici sought and initially obtained verbal consent to file this brief from Neil Levine, Attorney for Intervenors, Environmental Defense Center and Butte Environmental Council. However, on December 6, 2001, Mr. Levine indicated that he was withdrawing his consent to the filing of this amicus brief. Therefore, pursuant to Supreme Court Rule 37(2)(b) amici prepared this motion to obtain leave of the Court for submission of this brief.

Amici Curiae are States, a U.S. territory, and an individual with an interest in having this Court accept a case which reviews the applicability of the Commerce Clause to the takings portion of the Endangered Species Act. This brief presents a different perspective than that of the parties to this case, in that it focuses on the Act's infringement on important rights properly reserved to the States, specifically the rights to regulate property within the States, to enact and enforce criminal laws, and to exercise general police powers to protect the general safety and welfare of the citizens of the States. The brief provides relevant matter not already brought to the Court's attention by the parties by providing a broader context for consideration of the applicable federalism issues.

For the foregoing reasons, amici respectfully request that the Court grant this Motion and accept for filing the attached brief, inclusive of all amici. In the alternative, amici States and Territory respectfully request that this Court accept the attached brief pursuant to Supreme

Court Rule 37(4), striking any amici that are not covered by this provision.

DON STENBERG
Attorney General
State of Nebraska
2115 State Capitol Building
Lincoln Nebraska 68509-8920
(402) 471-2682

Counsel of Record

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INTEREST OF AMICUS CURIAE[1]

Nebraska and the other named states submit this brief as amici curiae in support of Petitioners, the Building Industry Association of Superior California, Marvin L. Oates, and the Sacramento Metropolitan Chamber of Commerce. The Petitioners have requested this Court to review two issues. The first issue, and the only issue addressed herein, involves whether the federal power to regulate commerce among the several states extends to regulation of non-economic intrastate activities under the Endangered Species Act.

The Endangered Species Act (the "Act") directs the Secretary of the Interior, through the United States Fish and Wildlife Service (the "Service") to determine whether a species is endangered or threatened. *See* 16 U.S.C. § 1533(a). Once the Service determines that a species is endangered or threatened, the Act affords that species various protections, substantially restricting private conduct. 16 U.S.C. § 1538(a)(1). The Act imposes both civil and criminal sanctions on anyone who "takes," possesses, sells, delivers, transports, ships, or harms, these species by any means whatsoever without a federal permit. *See* 16 U.S.C. §§ 1538(a)(1) and 1540(a) and (b). For each separate violation of the Act, an individual may be subject to a civil penalty of up to $25,000 per violation, and a criminal penalty of up to $50,000 and one year imprisonment. 16 U.S.C. §§ 1540(a) and (b).

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[1] Amicus Curiae authored this brief in its entirety, and no portion thereof was authored by any party to this case. No person or entity, other than the amicus curiae, made monetary contributions to the preparation or submission of this brief.

Of particular interest to the amici States is the Act's prohibition against taking any protected species, which is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." 16 U.S.C. § 1532(19). The Act has been interpreted to prohibit construction, farming operations, and other otherwise lawful activities on private land. The Act, when directed at non-economic intrastate activities, interferes with important rights properly reserved to the states, specifically the rights to regulate property within the state, to enact and enforce criminal laws, and to exercise general police powers to protect the general safety and welfare of the citizens of the state. It also interferes with the rights of citizens to use their private property.

The Court should resolve this important issue in favor of the Petitioners in order to prevent the Federal Government from taking over the regulation of entire areas of traditional state concern having nothing to do with the regulation of interstate commerce. "Th[e] [federal] government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise. . . . " *McCulloch v. Maryland*, 17 U.S. 316, 405, 4 Wheat. 316, 405 (1819). In a sense, any conduct in this interdependent world arguably has some economic consequence, but this Court has never interpreted Congress' Commerce Clause power so broadly. To the extent that the lower courts' rulings conflict with this Court's Commerce Clause jurisprudence, the States need

this Court to provide guidance on the appropriateness of federal regulation of non-commercial intrastate activities such as those at issue in this case. The amici States respectfully request this Court to provide that needed guidance by granting Petitioners' petition for certiorari.

SUMMARY OF ARGUMENT

When the States were creating the federal government, there was a great fear that a powerful federal government would threaten the ability of the States to govern themselves and would threaten the freedom of individual citizens.

Several mechanisms were put into the Constitution to limit federal power and to prevent federal intrusion into fundamental local issues. Most importantly here, the federal government was given only specific enumerated powers. All other powers were reserved to the States and the people. Except for the Fourteenth Amendment, which is not at issue here, the Constitution has never been amended to increase federal power at the expense of state power.

The fundamental question presented here is whether the framers of the Constitution intended to authorize the federal government to imprison citizens for engaging in otherwise lawful activities such as farming, constructing a house, or driving through a puddle on their own property in order to protect tiny crustaceans or other species that are wholly intrastate and are not part of interstate commerce. If the federal government can exercise a police power this broad and sweeping then the effort of the

framers of the Constitution to limit the power of the federal government will have entirely failed.

A decision in Petitioners' favor would not mean that the federal government would be without means to protect intrastate, non-economic endangered species. Under its spending power, the federal government could purchase habitat and prevent any human activity on its own land. Within limits, it could also offer grants to states to encourage the states to protect endangered species. The federal government could also prohibit the interstate transportation of endangered or threatened species.

If the people of the United States wish to empower the federal government to exercise sweeping local police powers in the absence of interstate commerce, they can amend the Constitution to do so. They have not.

It was never intended that the federal government should have the power to act on every problem. Indeed, it was clearly intended that the federal government should *not* have such power. This Court, in recent years, has recognized this important principle. In order to reinforce its recent Commerce Clause decisions and to further clarify the limits of federal commerce clause power, the Court should grant the Petition.

ARGUMENT

I. THE COURT SHOULD GRANT THE PETITION IN ORDER TO PROTECT THE STATES AND THEIR CITIZENS FROM THE EXERCISE OF A GENERAL FEDERAL CRIMINAL POLICE POWER UNRELATED TO THE REGULATION OF INTERSTATE COMMERCE.

Congress' Commerce Clause power is an enumerated power under the United States Constitution that was adopted to facilitate trade among the several states, not to provide the federal government with sweeping local police powers to infringe on those rights reserved to the states.

The Constitution creates a Federal Government of enumerated powers. *See* U.S. Const., Art. I, § 8. "The powers delegated by the proposed constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." *United States v. Lopez*, 514 U.S. 549, 552, 115 S. Ct. 1624 (1995) (*quoting* James Madison, The Federalist No. 45, pp. 292-293 (C. Rossiter ed. 1961)). "Th[e] [federal] government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise. . . . " *McCulloch v. Maryland*, 17 U.S. 316, 405, 4 Wheat. 316, 405 (1819). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal

Government [reduces] the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

"This constitutionality mandated division of authority 'was adopted by the Framers to ensure protection of our fundamental liberties.' " *Lopez*, 514 U.S. at 552, 115 S. Ct. 1624 (*quoting Gregory*, 501 U.S. at 458, 111 S. Ct. at 2395). This division of authority protects the States from a powerful federal government threatening their ability to govern themselves and safeguarding the individual liberties of their citizens. Except for the Fourteenth Amendment, which is not at issue here, the Constitution has never been amended to increase federal power at the expense of state power beyond the originally enumerated powers articulated therein.

One of the Constitutionally enumerated powers delegated to Congress was the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8, cl. 3. At the time the Constitution was written and ratified, the term "commerce" merely involved "trade or traffic," Nathaniel Bailey, A Universal Etymological English Dictionary (26th ed. 1789), and concerned an "[e]xchange of one thing for another," Thomas Sheridan, A Complete Dictionary of the English Language (6th ed. 1796). This delegation was necessary to provide a framework for trade among the several states, to encourage and protect interstate commerce, not to regulate intrastate activities.

As defined in *Gibbons v. Ogden*, 9 Wheat. 1, 189-90, 6 L. Ed. 23 (1824): "[c]ommerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of

nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." The commerce power "is the power to regulate, that is, to prescribe the rule by which commerce is to be governed." *Id.* at 196. However, the commerce power does not extend to that "which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States." *Id.* "Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. . . . The enumeration presupposes something not enumerated; and that something, if we regard the language, or the subject of the sentence, must be the exclusively internal commerce of a State." *Id.* at 194-95.

In *Lopez*, this Court reviewed in great detail the development of the law relating to Congress' Commerce Clause authority. *See Lopez*, 514 U.S. at 551-59, 115 S. Ct. at 1626-1630. The Court noted that even in an era of expanded congressional power, the Court maintained limits on the scope of commerce power to avoid "effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *Id.* at 554, 115 S. Ct. at 1628-29 (*quoting Jones & Laughlin Steel*, 301 U.S. 1, 37, 57 S. Ct. 615, 624 (1937)). The Court has continued to recognize that "the powers delegated by the . . . Constitution to the federal government are few and defined," unlike those retained by the states which "are numerous and indefinite." *Lopez*, 514 U.S. at 552, 115 S. Ct. at 1626 (*quoting*

James Madison, The Federalist No. 45, pp. 292-293). With this constant in mind, the Court has construed the commerce clause to permit Congress to regulate just three areas of commercial activity: (1) the use of the channels of interstate commerce; (2) the instrumentalities of, or persons or things in, interstate commerce; and (3) other activities that "substantially affect" interstate commerce. *Lopez*, 514 U.S. at 557-59.

The Court has never construed the power to regulate commerce to include a general police power over local crimes, torts, family law and other social matters. Furthermore, this court has expressly held that "[t]he regulation and punishment of intrastate violence that is not directed at [interstate commerce] has always been the province of the States." *United States v. Morrison*, 529 U.S. 598, 618, 120 S. Ct. 1740, 1754 (2000) (*citing Cohens v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257 (1821)). "[T]he Constitution reserves the general police power to the States . . . and cannot realistically be interpreted as granting the Federal Government an unlimited license to regulate." *Id.* at 619, 120 S. Ct. at 1754, Fn. 8 (citations omitted). If Congress has no constitutional power to regulate or punish intrastate violence against human beings, then clearly it has no constitutional power to regulate or punish intrastate violence against crustaceans, insects, or other lesser life forms.

The Petition raises an important question concerning the balance of state versus federal power under the Constitution of the United States that should be resolved by this Court.

II. THIS COURT SHOULD GRANT CERTIORARI TO REINFORCE ITS RECENT COMMERCE CLAUSE DECISIONS AND FURTHER CLARIFY THE LIMITS OF FEDERAL COMMERCE CLAUSE POWER.

In *Lopez* and *Morrison*, this Court set forth important principles that were to be applied when federal legislation is challenged for exceeding Congress' power under the interstate Commerce Clause. Those principles were either ignored or seriously misapplied by the lower courts in this case. The Court should grant the Petition in order to ensure that its recent Commerce Clause rulings will be properly applied by the lower federal courts in the future.

The actions at issue in this case involve the "taking" of an intrastate species on private property within a state's boundaries. Of particular concern to the amici States are activities that, if prohibited, pose a threat to local land use rights traditionally reserved to the regulatory powers of the states and put an individual at risk for substantial civil and criminal penalties (including imprisonment) for otherwise lawful activities. For example, the Act clearly contemplates the prohibition of personal use of one's land that might interfere ever so slightly with an endangered species such as the fairy shrimp. This could involve a multi-million dollar land development project, or it could be something as slight as two young children playing baseball in their backyard. Either of these activities could impede upon a small vernal pool, thus "taking" a fairy shrimp for purposes of the Act and resulting in a violation subject to substantial civil and criminal penalties. Effectively, an individual

could be imprisoned for simply walking on his own land. The Act's anti-takings provision does not differentiate between activities that are non-commercial and commercial in nature, nor does it contain a jurisdictional requirement that an activity substantially relate to interstate commerce to be a violation. Clearly the anti-takings provision exceeds Congress' authority under the Commerce Clause, and this Court should find the Act unconstitutional to the extent it applies to wholly intrastate non-commercial activities.

In *Lopez*, this Court struck down the Gun-Free Schools Zone Act as an invalid exercise of Congress' Commerce Clause authority. *Lopez*, 514 U.S. 549, 115 S. Ct. 1624. The Gun-Free Schools Zone Act prohibited possession of a gun within 1,000 feet of a school. *Id.* Although guns are bought and sold across state lines, this Court held that the Act "has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Id.* at 561, 115 S. Ct. at 1631. Additionally, this Court found that the Gun-Free Schools Zone Act did not contain a jurisdictional element that "would ensure, through a case-by-case inquiry, that the firearm possession in question affects interstate commerce" or that would limit the Act's reach "to a discrete set of firearms possessions that additionally have an explicit connection with or effect on interstate commerce." *Id.* at 562, 115 S. Ct. at 1631. This Court rejected the government's argument that the aggregated costs of gun-related crime had a substantial impact on the economy and adversely effected education, noting that such an argument would provide Congress with a general police power like that retained by the states allowing it to

regulate virtually any individual activity. *Id.* at 564-67, 115 S. Ct. at 1632-33.

In *Morrison*, the Court stated that "[t]he regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States." *Morrison*, 529 U.S. at 618, 120 S. Ct. at 1754 (*citing Cohens v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257 (1821)). "[T]he Constitution reserves the general police power to the States . . . and cannot realistically be interpreted as granting the Federal Government an unlimited license to regulate." *Id.* at 619, 120 S. Ct. at 1754, Fn. 8 (citations omitted).

With the exception of the provisions of the Act prohibiting the sale and transportation of endangered species, which are not at issue in this case, the non-economic, criminal nature of the activities regulated by the Act is similar to that in *Lopez* and *Morrison*. Unlike guns, however, it is not alleged that endangered species are currently of commercial value, only that someday their genetic heritage might be of some currently incalculable value to society. *See Building Industry Association of Superior California v. Babbitt*, 979 F. Supp. 893, 907 (D.C. 1997). The District Court does make reference to the possibility that these species may affect the "interstate movement of persons . . . who come to a state to observe and study [them.]" *Id.* Yet this very argument was rejected by this Court in *Morrison* as too attenuated to qualify as a substantial effect on commerce under *Lopez's* third prong. *See Morrison*, 529 U.S. at 613, 120 S. Ct. at 1752.

Of all the provisions in the Act, the anti-takings provision has the most attenuated connection to interstate commerce and the highest risk of interfering with inherent state rights, yet Congress failed to include a jurisdictional limitation to ensure that activities prohibited by the anti-takings provision were within its Commerce Clause authority. There are no substantive or procedural provisions in place to prevent the Service from intensely regulating non-economic intrastate activities (such as a child riding a bicycle or running in his own yard and inadvertently stepping in a vernal pool where a fairy shrimp might lie), as a means of wildlife protection.

The Act's anti-takings provision, as interpreted by the District Court and the D.C. Circuit Court of Appeals, delegates Congressional authority to the Service to regulate virtually any private activity that may affect an endangered species or the habitat thereof, regardless of whether it is wholly intrastate or non-economic in nature. This unfettered authority is not limited to regulating activities that substantially affect interstate commerce, but instead is intended as a general police power implemented to protect the interests of mankind in preserving the genetic heritage of such species. The Constitution does not give Congress the unfettered authority to define what commerce is, but merely provides Congress with the authority to regulate such commerce among the several states. U.S. Const., Art. I, § 8, cl. 3. Congress has clearly exceeded its Commerce Clause authority insofar as the Act regulates intrastate non-economic activities. This improperly impedes upon the authority inherently reserved to the states, particularly the states' rights to

regulate property within their borders, to enact and enforce criminal laws regulating intrastate activity, and to exercise general police powers to protect the general safety and welfare of their citizens.

The decisions below are more than a mere misapplication of *Lopez* and *Morrison*. They reveal a mindset that if an issue is important enough as a policy matter, there is no effective limit on the power of the federal government to criminalize private conduct that is neither in nor substantially affects interstate commerce. The concept of vast federal power is so ingrained in our society that even learned federal jurists have difficulty accepting the direction of the framers of our Constitution and of this Court that there are indeed limits to federal power. This case will help determine whether *Lopez* and *Morrison* will be seen as interesting anomalies, limited to their unique facts, on the road to unrestricted federal power, or whether they reflect important principles for the protection of states and individual citizens which will be enforced by this Court from this day forward.

CONCLUSION

For the foregoing reasons, the amici States respectfully request this Honorable Court to grant the petition for certiorari.

Respectfully submitted,

DON STENBERG
Attorney General
2115 State Capitol
Lincoln, Nebraska 68509-8920
Tel: (402) 471-2682

Supreme Court, U.S.
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DEC 13 2001
CLERK

No. 01-620

In The

Supreme Court of the United States

BUILDING INDUSTRY ASSOCIATION OF SUPERIOR CALIFORNIA, ET AL.,

Petitioners,

v.

GALE NORTON, ET AL.,

and

ENVIRONMENTAL DEFENSE CENTER, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

NEIL LEVINE
Counsel of Record
EARTHJUSTICE
UNIVERSITY OF DENVER LAW SCHOOL
Forbes House
1714 Poplar Street
Denver, CO 80220
Telephone: (303) 871-6996

Attorney for Respondents Environmental Defense Center and Butte Environmental Council

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Was the U.S. Fish and Wildlife Service's decision, under the Endangered Species Act, to place species of fairy shrimp on the list of endangered species a permissible exercise of Congress' Constitutional authority?

II. Did the U.S. Fish and Wildlife Service violate required procedures by not requesting additional public comment before listing the fairy shrimp based on receipt of a study that confirmed existing information about species distribution?

LIST OF PARTIES

The following are parties to this proceeding:

Petitioners: Building Industry Association of Superior California, Sacramento Chamber of Commerce & Marvin Oates

Respondents: Secretary of the Interior Gale Norton, Acting Director of U.S. Fish & Wildlife Service, Marshall Jones, Environmental Defense Center & Butte Environmental Council

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Environmental Defense Center and Butte Environmental Council have no parent companies and issue no corporate stock.

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INTRODUCTION

Petitioners offer no reason for this Court to review the lower court's decision sustaining the listing of species under the Endangered Species Act (ESA) as a legitimate exercise of Congress' Commerce Clause authority. As an initial matter, Petitioners' Commerce Clause claim is not ripe for review because they have challenged the placement of species on the endangered species list, and not a site-specific application of the listing. There is no need for the Supreme Court to consider the Commerce Clause issue since the lower courts have unanimously upheld the ESA and its implementation against this type of constitutional challenge and have adhered conscientiously to Supreme Court jurisprudence in doing so. In any case, Petitioners' constitutional claim is undermined by the fact that the species involved do not occur only within a single state – the species reside in both California and Oregon. The Petition for a Writ of Certiorari should therefore be denied.

There is also no reason to review Petitioners' claim that the U.S. Fish and Wildlife Service (FWS) should have re-opened the comment period based on receipt of one scientific study. In keeping with established precedent, the D.C. Circuit ruled that additional notice and comment was not necessary because the study merely confirmed existing information about the species' population distribution. Contrary to Petitioners' claim, the ruling does not create a conflict between the D.C. and Ninth Circuits. Indeed, the two courts are applying the same legal standards. This unexceptional ruling does not warrant Supreme Court review.

STATEMENT OF THE CASE

I. THE ENDANGERED SPECIES ACT

The ESA is Congress' response to the growing concerns over the extinction of many animal and plant species throughout the United States. It "provide[s] a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b). To achieve its objectives, the ESA directs FWS to determine which species of plants and animals warrant ESA regulatory protection and to place those imperiled species on the list of threatened and endangered species. *Id.* § 1533(a). Two of the statutory factors for ESA listing are the present or threatened destruction, modification or curtailment of habitat or range and the inadequacy of existing regulatory mechanisms. *Id.* § 1533(a)(1). FWS must make listing decisions "solely on the basis of the best scientific and commercial data available" and in conformance with a series of statutory deadlines. *Id.* § 1533(b)(1)(A); § 1533(b)(3) & (6). The ESA requires FWS to notify the public and request public comment on a proposed listing rule. *Id.* § 1533(b)(4).

Once a species is placed on the list of threatened and endangered species, the regulatory framework of the ESA may be applied to specific activities and projects. Under section 9, Congress made it unlawful for any person to "take" a species, which prohibits activities significantly modifying a species' habitat, as well as the killing, wounding, trapping, collecting, capturing, or trapping of a listed species. 16 U.S.C. § 1538(a)(1)(B) & (G); 50 C.F.R. § 17.31 (extending "take" prohibition to "threatened" species); *Babbitt v. Sweet Home Chapter of Communities of*

Greater Oregon, 515 U.S. 687 (1995) (upholding ESA definitions of "take" and "harm" as applied on public and private lands). To temper this prohibition, in section 10, Congress authorized FWS to issue permits that allow for the "incidental" taking of listed species for specific activities. 16 U.S.C. § 1539. Further, in ESA section 7, Congress prohibited federal agencies from jeopardizing the continued existence of any endangered or threatened species. 16 U.S.C. § 1536(a)(2). To avoid jeopardy, agencies must "consult" with FWS before issuing permits and taking actions and receive FWS approval for their site-specific projects. *Id.*; *Bennett v. Spear*, 520 U.S. 154 (1997) (describing section 7 process).

II. LISTING PROCESS

In 1991, FWS determined that listing the fairy shrimp "may be warranted" because the species' distribution within the historic range, southern Oregon through California, was extremely limited. 56 Fed. Reg. 42968-69 (August 30, 1991). After further reviewing the status of the species, FWS published a proposed listing rule. 57 Fed. Reg. 19856, 19861 (May 8, 1992). In the listing proposal, FWS stated that the fairy shrimp are "extremely sporadic in their distribution since they may inhabit only one or a few pools in otherwise more widespread vernal pool complexes" and the "distribution of vernal pools is highly discontinuous." 57 Fed. Reg. at 19856.[1] The

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[1] Vernal pools are freshwater wetlands. They typically form in shallow depressions that fill with rainwater and snowmelt run-off. The pools are frequently clustered into assemblages known as vernal pool complexes. Vernal pool areas provide

proposed rule identified urban development, agricultural activities, water developments, and flood control activities as the causes of the species' decline. *Id.* at 19858-60. FWS also found that existing regulatory mechanisms, including state and local laws as well as other federal laws and regulations, failed to adequately protect these species. *Id.* at 19860.

Public comment on the 1992 listing proposal exceeded that required under the ESA. FWS held an initial 60-day comment period on the proposed rule and later extended public comment for an additional 60 days at the public's request. 57 Fed. Reg. 19856; 57 Fed. Reg. 36380. FWS held multiple public hearings. 57 Fed. Reg. 19856. The Simovich study, the object of Petitioners' notice and comment procedural challenge, was submitted during the comment period on the proposed rule. Pet. App. B-7. This study along a proposed 200-mile pipeline in California confirmed existing information about species distribution. Pet. App. C-14.

On September 19, 1994, FWS listed the fairy shrimp. 59 Fed. Reg. 48136.[2] Once again, threats to habitat and the inadequacy of local, state, and federal regulations were the justifications for ESA listing. Pet. App. B-3, C-6. In

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important wintering and feeding grounds for migratory waterfowl along the Pacific flyway and the only habitat for the listed shrimp species and several native plant species. *See generally*, 59 Fed. Reg. 48136, 48137.

[2] Contrary to Petitioners' unsupported claim, FWS never "extended the date for a final decision to collect additional data." Pet. 22-23. Rather, FWS violated the ESA deadline for a final listing without reason (16 U.S.C. § 1533(b)(6)(A)), prompting a lawsuit to secure a listing decision. Pet. App. C-5.

addition, placing the species on the endangered species list was warranted because the distribution of the species within its known range was limited. 59 Fed. Reg. at 48136 ("sporadic in their distribution").

III. PROCEEDINGS BELOW

Petitioners filed suit in 1995 challenging FWS's decision to place fairy shrimp on the list of threatened and endangered species. Both the District Court and D.C. Circuit rejected each one of Petitioners' thirteen claims challenging the listing. Relevant to these proceedings, on July 25, 1997, District Court Judge Paul Friedman rejected Petitioners' Commerce Clause challenge to the listing. Pet. App. C-22-25. The court applied the Supreme Court framework articulated in *U.S. v. Lopez*, 514 U.S. 549 (1995) and found that the ESA as a whole and the listing of the fairy shrimp species in particular were actions within Congress' Commerce Clause authority. *Id.* at C-24. Judge Friedman also determined that additional public comment on the Simovich study was not necessary because "the Final Rule does not turn on the Simovich study result." Pet. App. C-14.

Writing for the D.C. Circuit, Judge Silberman affirmed the district court's ruling on May 8, 2001. The court expressed no opinion on the Commerce Clause claim, but simply acknowledged that Petitioners raised the issue "only to preserve the possibility of en banc review." Pet. App. B-10, n.8. Judge Silberman also concluded that the final listing rule was the logical outgrowth of the proposal rule and that the Simovich study did not warrant re-opening the public comment period.

Pet. App. B-8 ("the Simovich study, while the best available, only confirmed the findings delineated in the proposal").

On July 13, 2001, without an opinion, the D.C. Circuit denied Petitioners' request for *en banc* review on both claims and no judge requested a vote.

REASONS FOR NOT GRANTING REVIEW

I. THERE IS NO NEED TO REVIEW ANOTHER COMMERCE CLAUSE CHALLENGE TO THE ESA

A. PETITIONERS' CLAIM IS NOT RIPE

Petitioners' Commerce Clause challenge to placing the fairy shrimp on the list of endangered species is not ripe for judicial review. As this Court has held, challenges to an agency's programmatic decisions are not ripe until there is a site-specific action. *Ohio Forestry v. Sierra Club*, 523 U.S. 726, 733 (1998). In *Ohio Forestry*, the court held that a challenge to a Forest Service Land and Resource Management Plan that governed management of an entire national forest was not ripe. Mere adoption of the Plan, as contemplated under the National Forest Management Act, 16 U.S.C. § 1604, did not cause significant practical harm to plaintiff's interest, even if the Plan established where logging could occur and set the parameters for future logging activities. *Id.* at 729, 733. Under the Plan, the Forest Service would have to undertake multiple future actions before logging could begin. *Id.* at 734. Accordingly, the Court ruled that plaintiff's claim would not be ripe until the Forest Service approved a

site-specific action, at which time the harm would be "more imminent and certain," the agency could address plaintiff's specific concerns, and the court would benefit from reviewing a concrete action as opposed to predicted consequences. *Id.* at 734-36.

Moreover, the general rule is that a constitutional challenge is not ripe for review until the government actually *applies* the law to a claimant. *Fort Wayne Books v. Indiana*, 489 U.S. 46, 60 (1989) (court ruling that constitutional claims would only be ripe should statutory provisions be enforced against petitioners); *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 297 (1981) (court noting that before constitutional claims become ripe, the challenged statutory provisions had to be applied against petitioners and petitioners had to avail themselves to administrative remedies); *see also Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 798 (1984) (reaffirming rule that "constitutional adjudication requires review of the application of a statute to the conduct of the party before the court"). Thus, for Petitioners' Commerce Clause challenge to be ripe, they must identify some site-specific application of the challenged listing decision to their activities.

Petitioners' challenge to FWS's decision to place the fairy shrimp on the list of endangered species is analogous to adoption of the Management Plan in *Ohio Forestry*. Although listing makes the ESA's conservation prescriptions available, it is not until actual implementation of the ESA's provisions to a site-specific project, like implementation of the Forest Management Plan, that a challenge becomes ripe. FWS has not applied the ESA to

Petitioners by approving or preventing a site-specific project that affects the listed fairy shrimp. Petitioners have not sought an ESA section 10 permit or been subject to an ESA section 9 enforcement action. As a result, at this point, Petitioners' constitutional claim is not concrete, but instead "rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998). Whether the listing decision will be applied to Petitioners' economic activities, and thus whether judicial intervention will ever be required, is speculative.

Accordingly, the proper course for Petitioners is to await a site-specific application of the listing rule to raise their Commerce Clause argument. *See Ohio Forestry*, 523 U.S. at 733. Petitioners will have ample opportunity to raise their constitutional challenge in the future in the context of a specific ESA section 10 permit application or ESA section 7 consultation. Indeed, in every prior challenge to the ESA under the Commerce Clause, the implementation of a listing decision was at issue, and not the mere listing of a species.[3]

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[3] *Gibbs v. Babbitt*, 214 F.3d 483, 493-94 (4th Cir. 2000), *cert. denied*, 531 U.S. 1134 (2001); *National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998); *Palila v. Hawaii Dep't of Land & Natural Resources*, 471 F.Supp. 985 (D.Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981); *Rancho Viejo v. Norton*, 2001 WL 1223502 (D.D.C. Aug. 20, 2001); *GDF Realty v. Norton*, 2001 WL 1223519 (W.D. Tex. Aug. 30, 2001).

B. COURTS HAVE UNANIMOUSLY UPHELD ACTIONS UNDER THE ESA AGAINST COMMERCE CLAUSE CHALLENGES

There is no split between the circuits or lower courts necessitating this Court to establish a rule of law. *Every* federal court that has addressed the constitutionality of the ESA and its implementation has agreed that the Commerce Clause authorizes such federal protection of wildlife, even for species that happen to reside in only one state. *Gibbs v. Babbitt*, 214 F.3d 483, 493-94 (4th Cir. 2000), *cert. denied*, 531 U.S. 1134 (2001) (upholding ESA reintroduction program for red wolves); *National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998) (upholding application of section 9 to proposed hospital to protect Delhi Sands flower-loving fly); *Palila v. Hawaii Dep't of Land & Natural Resources*, 471 F.Supp. 985 (D.Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981) (affirming application of ESA section 9 to livestock grazing activities to protect endangered Hawaiian birds); *GDF Realty v. Norton*, 2001 WL 1223519 (W.D. Tex. Aug. 30, 2001) (upholding section 9 regulation application to commercial development project to conserve Texas insects); *Rancho Viejo v. Norton*, 2001 WL 1223502 (D.D.C. Aug. 20, 2001) (affirming application of section 7 jeopardy standard to residential development for protection of arroyo toads). Moreover, the Supreme Court has considered the ESA and has never questioned the constitutionality of the statute itself or its implementation. *Bennett*, 520 U.S. 154; *Sweet Home*, 515 U.S. 687; *TVA v. Hill*, 437 U.S. 153 (1978). Accordingly, there is no conflict that threatens the consistency of federal law.

Petitioners' present constitutional claim is identical to the prior failed challenges under the Commerce Clause to the ESA. In *Gibbs*, Chief Judge Wilkinson of the Fourth Circuit ruled that application of an ESA reintroduction program for North Carolina's red wolves, including a prohibition against certain agricultural activities and shootings, was within Congress' Commerce Clause authority. *Gibbs*, 214 F.3d at 493-95. In *Home Builders*, the D.C. Circuit rejected the Commerce Clause argument that ESA section 9 could not be applied to protect California's Delhi Sand flower-loving fly from a proposed hospital. *Home Builders*, 130 F.3d at 1057. Both courts rejected the exact arguments Petitioners make in this case. The present case is not distinguishable in any relevant manner from these cases.[4] Notably, in finding Commerce Clause authority, the Fourth and D.C. Circuits adhered conscientiously to the rules laid down by this Court in *U.S. v. Morrison* and its predecessor *U.S. v. Lopez*. This Court denied certiorari in both cases. *Gibbs*, 531 U.S. 1134 (2001); *Home Builders*, 524 U.S. 937 (1998).[5]

In short, unless and until either some genuine conflict arises in the lower courts regarding the application of this Court's Commerce Clause decisions to the ESA or

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[4] Indeed, Petitioners recognized in briefing to the D.C. Circuit that the *Home Builders* decision controls and did not try to distinguish the *Home Builders* case. Pet. App. B-10, n.8.

[5] Petitioners mistakenly assert that the decision in *Home Builders* "was patently inconsistent with this Court's rationale in *Lopez*." Pet. 13. If that were so, this Court would have granted certiorari in *Home Builders*.

some real reason exists to believe that this Court's precedents are not being conscientiously followed, there is no need for the Court to address this Commerce Clause issue. Petitioners cannot simply re-litigate the *Home Builders* case. Yet, in their petition, Petitioners focus almost entirely on the D.C. Circuit's ruling in *Home Builders* and argue certiorari in this case is appropriate because *Home Builders* is an "unsupportable decision" that was made "in error and conflicts with the decisions of this Court" (Pet. 11), and which lacks "any cogent rationale" (Pet. 19) and sets a "dubious precedent." Pet. 22. However, this Court already had the opportunity to consider *Home Builders*, but denied the petition for a writ of certiorari. Petitioners cannot litigate a case already fully decided.[6]

C. UNDER SUPREME COURT STANDARDS, THE CHALLENGED LISTING DECISION IS A VALID EXERCISE OF CONGRESS' COMMERCE CLAUSE AUTHORITY

Under this Court's rulings in *U.S. v. Morrison*, 527 U.S. 598 (2000) and *U.S. v. Lopez*, 514 U.S. 549 (1995), the regulation of intrastate activities that substantially affect commerce fall within Congress' Commerce Clause authority. In *Morrison*, the Court emphasized that in reviewing an intrastate activity, a key question is whether

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[6] Petitioners state that the lower court deferred to the decision in *Home Builders*. Pet. 11. This characterization is wrong, if not disingenuous. At Petitioners' request, the D.C. Circuit did not rule on the Commerce Clause claim or defer to *Home Builders*. Pet. App. B-10, n.8.

the activity being regulated is "economic activity." *Morrison*, 529 U.S. at 610, 613. If not, a non-economic intrastate activity could still be regulated under the Commerce Clause if, in the aggregate, the activity substantially impacts interstate commerce. *Id.* at 613. In *Morrison*, the Court ruled that a statute providing civil remedies for gender-motivated crimes exceeded Congress' Commerce Clause authority. As in *Lopez*, where the Court overturned a statute criminalizing the possession of guns in schools, the *Morrison* Court ruled that criminal activity is not economic in nature, did not impact interstate commerce, and was traditionally an activity within a state's police powers. *Morrison*, 529 U.S. at 618.

1. PETITIONERS OMIT A CRITICAL DECIDING FACT

Fairy shrimp are not limited to one state. The fundamental premise of Petitioners' Commerce Clause challenge to the listing is that fairy shrimp are a "wholly intrastate" (Pet. 2) species that are "limited to the California Central Valley." Pet. 11. Inexcusably, Petitioners ignore the fact that fairy shrimp also live in the State of Oregon. They are not an intrastate species. Populations of fairy shrimp occur in the Agate Desert in Southwestern Oregon, on both private and public lands. 65 Fed. Reg. 18026, 18028 (April 4, 2000) ("discovery of a new population of vernal pool fairy shrimp in Jackson County, Oregon").[7]

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[7] *See also* Evans & Associates, Agate Desert Vernal Pool Surveys (March 19, 2001); Borgias, et al., Fairy Shrimp Survey on Public Lands on the Agate Desert Landform, Jackson County, Oregon (July 19, 1999).

As set forth in the final listing rule, the habitat range of fairy shrimp "extends from Southern Oregon into Northern Baja, Mexico." 59 Fed. Reg. at 48136; 57 Fed. Reg. at 19857 (same statement in 1992 proposed rule). As a result, biologists move between states to study fairy shrimp, and economic activities in multiple states affect these species. Since Petitioners' Commerce Clause claim is dependent on the occurrence of fairy shrimp in only California, the presence of the species in another state undermines the argument.

2. PROTECTING THESE SPECIES UNDER THE ESA SUBSTANTIALLY AFFECTS INTERSTATE COMMERCE

Even if fairy shrimp only occurred within a single state, which they do not, placing these species on the endangered species list is a valid exercise of Congress' Commerce Clause authority. First, the ESA is a Congressional program for endangered species that substantially affects the economy. In the ESA, Congress recognized that imperiled species of wildlife constitute natural resources "of esthetic, ecological, educational, historical, recreational, and scientific value" to the nation. 16 U.S.C. § 1531(a)(5). The statute prohibits importing, exporting or selling listed species in interstate commerce. *Id.* § 1538(a)(2)(A), (C) & (D). Moreover, as this Court ruled, Congress intended the ESA to preserve "potential resources" of "incalculable" value. *TVA*, 437 U.S. at 178 (internal quotations and citation omitted). In short, Congress has constitutional authority to pass legislation to conserve endangered species. *Gibbs*, 214 F.3d at 497.

When a statute as a whole is constitutionally valid, like the ESA, this Court routinely rejects focusing on an individual instance of an intrastate activity. *Lopez*, 514 U.S. at 558 ("Where a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence"); *see also Hodel v. Indiana*, 452 U.S. 314, 329, n.17 (1981); *Perez v. United States*, 402 U.S. 146, 154 (1971). A court's review cannot be excessively narrow in this manner. *Id.* A wholly intrastate action with no interstate commerce connection is still constitutional, therefore, if it is part of a general larger regulatory scheme that substantially affects the economy.

Petitioners argue, however, that although the ESA as a whole is constitutionally valid, protecting certain species that happen to reside in only one state is not. Not only is this type of constitutional challenge misplaced, as this Court has held, but it is illogical. The district court in this case explained:

> According to plaintiffs, if a species is abundant and scattered plentifully across state lines, Congress is fully empowered under the Commerce Clause to protect it. But when that same species becomes more scarce and its population is reduced to a single state, Congress' hands are suddenly tied. The court declines to read *Lopez* as hamstringing Congress in such an irrational fashion in a regulatory area of such important economic, scientific and environmental dimensions.

Pet. App. C-25; *see also Gibbs*, 214 F.3d at 498 ("It would be perverse indeed if a species nearing extinction were found to be beyond Congress' power to protect while

abundant species were subject to full regulatory power"). Since Congress has the power to enact a statutory scheme for the conservation of endangered species, the protection of endangered species that are restricted to one state is not an unconstitutional federal action.

Second, the relationship between fairy shrimp and substantial impacts to interstate commerce is direct. The evidence in the record demonstrates that scientific research of fairy shrimp and their wetland habitat has generated numerous scientific studies and reports, the buying and selling of the species specimens, and the travel of scientists from other states to study and attend conferences on the species. Pet. App. C-23, n.23. In addition, Petitioners include a Chamber of Commerce from the City of Sacramento and a trade association dedicated to building homes in California's Central Valley. It is Petitioners' development activities, along with the conversion of wetlands to agricultural fields, that FWS determined adversely impacts these species. 59 Fed. Reg. at 48136. Since these economic activities have a substantial impact on interstate commerce within the meaning of *Morrison* and *Lopez*, Petitioners' Commerce Clause challenge does not warrant further review. *See Gibbs*, 214 F.3d at 495.

Without elaboration or analysis, Petitioners claim that listing the fairy shrimp intrudes upon an area of traditional state concern – land use. Pet. 17. FWS, however, is not engaging in regulating land use, but rather protecting wildlife by placing species on the endangered species list. *See California Coastal Commission v. Granite Rock*, 480 U.S. 572, 587 (1987). The federal government has a long history in the area of wildlife law. *See, e.g.*, 16

U.S.C. §§ 702-12 (Migratory Bird Treaty Act of 1918); 16 U.S.C. §§ 668-668d (Bald Eagle Protection Act of 1940); 16 U.S.C. §§ 1361-1421h (Marine Mammal Protection Act of 1972). This Court's recognition of the federal role in wildlife conservation began with *Missouri v. Holland*, 252 U.S. 416 (1920) and has never wavered. *See, e.g., Andrus v. Allard*, 444 U.S. 51, 63 n.19 (1979) (recognizing commerce power to protect migratory wildlife); *Douglas v. Seacoast Prods. Inc.*, 431 U.S. 265, 281-82 (1977) (federal regulation of fishing in state waters). States and the federal government may share regulatory responsibilities in this domain. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999) (States' role "in regulating wildlife and natural resources" . . . "is shared with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers").[8] Moreover, it is well established that "Congress can regulate even private land use for environmental and wildlife conservation." *Gibbs*, 214 F.3d at 500; *see also Sweet Home*, 515 U.S.

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[8] States play an integral role in regulating wildlife and the ESA respects that role. 16 U.S.C. § 1533(b)(1)(A) (upon determining whether a species is endangered, agency must consider "those efforts, if any, being made by any State . . . to protect such species"); *id.* § 1535(a) (federal agencies administering the ESA "shall cooperate to the maximum extent practicable with the States"); *id.* §§ 1531(b), 1532(3) (ESA's overriding purpose to recover imperiled wildlife species so that federal protections may be terminated and management of such species may revert to the States). Nonetheless, in the case of the fairy shrimp, FWS determined that ESA protection is necessary because local and state regulations have inadequately protected the species and its habitat. Pet. App. B-3, C-6.

at 692 (upholding ESA's section 9 "take" prohibition on both public and private lands). Accordingly, unlike the statutes struck down in *Lopez* and *Morrison*, which involved issues that were traditionally a local concern (crime), placing the fairy shrimp on the endangered species list, like the protection of other species on the verge of extinction, "does not plow thoroughly new ground" or "represent a sharp break with the long-standing pattern" of federal regulation. *See Lopez*, 514 U.S. at 563.

D. ANOTHER SOURCE OF CONSTITUIONAL POWER EXISTS TO SUSTAIN THE CHALLENGED AGENCY ACTION

In addition to being fully supported by the Commerce Clause, the challenged listing decision is valid as a necessary and proper measure to carry into effect the federal treaty power. *See* U.S. Const. art. VI, cl. 2; *id.* art. II, § 2, cl. 2. Although Petitioners did not address the treaty power, this source of authority provides an alternative constitutional basis for the challenged listing decision. This Court has recognized the treaty power as a basis for federal wildlife regulation on both public and private lands since *Missouri v. Holland*, where it sustained the Migratory Bird Treaty Act against a challenge virtually identical to that raised by the Petitioners here. *Missouri*, 252 U.S. at 433.

As with the Migratory Bird Treaty Act, the ESA implements international treaty obligations. In the ESA, Congress found that "the United States has pledged itself as a sovereign state in the international community to

conserve to the extent practicable the various species of fish or wildlife and plants facing extinction." 16 U.S.C. § 1531(a)(4). Congress identified several applicable treaties in section 2(a)(4) of the ESA. *Id.* (listing treaties). One of the treaties, the 1940 Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, promises protection of "all species and genera of . . . native flora and fauna . . . in sufficient numbers and over areas extensive enough to assure them from becoming extinct through any agency within man's control." 56 Stat. 1354, 1356, T.S. No. 981 (effective May 1, 1942). Congress enacted the ESA "to achieve the purposes" of these treaties. 16 U.S.C. § 1531(b). Accordingly, placing the fairy shrimp on the list of endangered species is constitutionally valid for this reason as well.

II. THERE IS NO DISPUTE BETWEEN CIRCUITS REGARDING WHAT CONSTITUTES ADEQUATE NOTICE AND COMMENT

Petitioners contend that every time an agency receives a study during an administrative process that confirms existing information, the agency must notice a new comment period and request additional public input. In this case, Petitioners believe FWS should have requested additional public comment on the Simovich study, which was submitted during the comment period.

Judge Silberman found Petitioners' complaints about the Simovich study unremarkable and held the study did not warrant re-opening the public comment period. This study of a proposed 200-mile pipeline through California

confirmed existing information about the species' limited distribution within their range.[9] The Simovich study was available to Petitioners, as well as the rest of the public, two years before the final rule was published. Judge Silberman held that the final listing rule was the logical outgrowth of the proposed rule and that the Simovich study did not change the listing decision to the detriment of Petitioners' interest;[10] rather, the study merely provided "better support than was previously available" for the listing decision. Pet. App. B-8. Accordingly, there was no need for FWS to request additional comment.

There is no legal conflict between Judge Silberman's decision and the Ninth Circuit's decision in *Idaho Farm Bureau v. Babbitt*, 65 F.3d 1392 (9th Cir. 1995). Petitioners'

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[9] FWS repeatedly recognized, throughout the listing process, that the distribution of the species was limited. In the 1992 listing proposal, FWS stated that fairy shrimp are "extremely sporadic in their distribution since they may inhabit only one or a few pools in otherwise more widespread vernal pool complexes." 57 Fed. Reg. at 19856 ("distribution of vernal pools is highly discontinuous"). In re-opening the comment period, FWS maintained that fairy shrimp "are sporadic in their distribution." 57 Fed. Reg. at 36380. In the final listing, citing to the Simovich study as well as other sources, FWS reiterated that the species "are sporadic in their distribution, often inhabiting only one or a few pools in otherwise more widespread vernal pool complexes." 59 Fed. Reg. at 48136.

[10] In both the proposal and final rule, FWS maintained that listing was necessary primarily due to threats to habitat and the inadequacy of "existing regulatory mechanisms." *Compare* 57 Fed. Reg. at 19856 with 59 Fed. Reg. at 48136; 57 Fed. Reg. at 19860 with 59 Fed. Reg. at 48147-49.

claim that a conflict exists is belied by the Ninth Circuit's reliance, in *Idaho Farm Bureau*, on the same cases and standards Judge Silberman relied upon. Both courts cited to the ruling in *Solite Corp.*, which held that "an agency may use supplementary data unavailable during the notice and comment period that expands on and confirms information in the proposed rulemaking and addresses alleged deficiencies in the pre-existing data so long as no prejudice is shown." *Solite v. EPA*, 952 F.2d 473, 484 (D.C. Cir. 1991). As both the D.C. and Ninth Circuits have recognized, there must be some finality to the administrative process. *City of Stoughton, Wisconsin v. EPA*, 858 F.2d 747, 753 (D.C. Cir. 1988) ("The statutory requirement of notice and the opportunity for comment on a proposed rule does not automatically generate a new opportunity for comment every time the Agency reacts to the comments"); *Hodge v. Dalton*, 107 F.3d 705, 712 (9th Cir. 1997). In short, the rule of law applied by Judge Silberman and the Ninth Circuit in *Idaho Farm Bureau* was the same. *See also* Pet. App. C-12, n.16 (district court applied same standard).

The decisions in the two cases turned on the specific facts and studies involved. In *Idaho Farm Bureau*, plaintiffs challenged a final rule listing the Bruneau hotsprings snail under the ESA. Plaintiffs argued that FWS failed to provide adequate notice and comment on a U.S. Geological Survey (USGS) report, which detailed the cause of reduced water levels that led to the species' decline. *Idaho Farm Bureau*, 65 F.3d at 1401. Prior to the final listing decision and receipt of the USGS report, there had been no supporting information on the "cause of declining water levels." *Id.* at 1402-03. The court held that the USGS

report "did not merely supplement or confirm existing data," but provided the only information addressing the cause of the decline in spring flows. *Id.* at 1403. The court also noted that the USGS report was not available to the public because it was in draft form at the time of the listing and contained calculation errors. *Id.*

The Simovich study exhibits none of the characteristics that justified additional notice and comment on the USGS report in *Idaho Farm Bureau*. First, it provided no new information about population distribution or any other factor that supported listing. The Simovich study merely confirmed previously known information. Moreover, the accuracy of the Simovich study has never been questioned and there are no errors in the data.[11] The Simovich study was in final form and available to the public for two years prior to listing. Because the Simovich study, unlike the USGS report, did not warrant additional notice and comment, there is absolutely nothing unique in the D.C. Circuit's decision that merits consideration.

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[11] Notwithstanding Petitioners' self-serving, yet unsubstantiated, claim that the Simovich study was "inadequate" (Pet. 22), every expert in the field agreed with its findings and recognized that "[t]his project is the most extensive and well-documented professional study of California's vernal pool invertebrates ever to be attempted." *See* Pet. App. C-14. The location of the study was randomly selected, with no regard to fairy shrimp, in 1960 by Pacific Gas & Electric for the purpose of constructing a pipeline through California's Central Valley. FWS also rejected Petitioners' "criticisms" of the Simovich study as presented in an ESA petition to de-list the fairy shrimp. 65 Fed. Reg. at 18027.

CONCLUSION

Petitioners present no legitimate reason for this Court to review another decision upholding the authority of Congress, and FWS, under the Commerce Clause to protect threatened and endangered species under the ESA. In addition, Judge Silberman's ruling on notice and comment did not break with established precedent and does not warrant Supreme Court review. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

NEIL LEVINE
EARTHJUSTICE
UNIVERSITY OF DENVER LAW SCHOOL
Forbes House
1714 Poplar Street
Denver, Colorado 80220
(303) 871-6996

Attorney for Respondents
Environmental Defense Center
and Butte Environmental Council

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